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SUPREME COURT, U.S.

NO. 80-5060

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

LONNIE JOE CARTER — PETITIONER

VS.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY — RESPONDENT

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APPENDIX

QUESTION PRESENTED FOR REVIEW

IS IT A DENIAL OF A CRIMINAL DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST COMPULSORY INCRIMINATION AND TO DUE PROCESS OF LAW FOR A STATE COURT TO REFUSE TO INSTRUCT THE JURY THAT "THE DEFENDANT IS NOT COMPELLED TO TESTIFY AND HIS FAILURE TO DO SO CANNOT PREJUDICE HIM OR BE USED AS AN INFERENCE OF GUILT" WHEN IT IS CLEAR THE DEFENDANT DECLINES TO TESTIFY FOR A REASON UNRELATED TO GUILT OR INNOCENCE AND COMMENT IS MADE AT TRIAL BY COUNSEL AND WITNESSES REGARDING THE DEFENDANT'S FAILURE TO EXPLAIN HIMSELF TO THE POLICE AND FAILURE TO TESTIFY AT TRIAL?

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Petitioner, Lonnie Joe Carter, respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky entered on May 13, 1980.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on May 13, 1980 and is not to be published [Appendix, hereinafter A, 1-13].

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on May 13, 1980. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in pertinent part:

> No person...shall be compelled in any criminal case to be a witness against himself...

The Fourteenth Amendment to the United States Constitution, in pertinent part:

> ...nor shall any State deprive any person of liberty...without due process of law...

STATEMENT OF THE CASE

Lonnie Joe Carter was indicted by the February, 1979 Christian County Grand Jury for third degree burglary of Young's Hardware store in Hopkinsville and as a persistent felony offender. Kentucky Revised Statute [KRS] 511.040; KRS 532.080 [Transcript of Record, hereinafter TR, 6]. Petitioner's trial was held May 17, 1979 [Transcript of Evidence, hereinafter TE, 1].

Officer Deborah K. Ellison of the Hopkinsville Police Department was on downtown patrol on the night of December 22, 1978 and noticed two black males in an alley. They began to run and she attempted to pursue. She called Officer Davis, who was nearby in another car, for assistance as she lost sight of the two men. Officer Ellison noticed that some bricks had been removed from the wall to Young's Hardware [TE, 24-33]. Officer Davis apprehended petitioner in the vicinity [TE, 60-61].

Petitioner was brought to the police station. Officer Ellison testified in detail that petitioner "didn't want to say anything" and refused to sign a "waiver

certificate" [TE, 36-39; CW. EX. 15]. Officer Davis also testified that during questioning petitioner refused to cooperate [TE, 67-68].[1]

The prosecution's evidence consisted of Officer Ellison's testimony that the "subject" (petitioner) "appeared" to have the same clothing as "the man I saw running" [TE, 34]. Officer Ellison stated that "it was fairly dark in the alley and I didn't get a real close look at his face" [TE, 45]. Additionally, two items allegedly dropped by petitioner were introduced, a bag and a radio said to be a set on a police band [TE, 64]. Finally, after repeatedly refusing to answer questions, petitioner allegedly admitted that two jackets found in the alley were both his [TE, 39].[2]

After the prosecution rested, a hearing was held regarding whether petitioner would testify and whether he would be impeached with prior felony convictions [TE, 96-106]. Petitioner was facing a second count of the indictment as a persistent felon offender. The record indicates that petitioner did not testify because he was going to be impeached by the use of three prior felonies—two of which were to be in issue during the second (PFO) phase of the trial. Pursuant to Cotton v. Commonwealth, Ky., 454 S.W.2d 698 (1970), petitioner would have been required to admit the prior convictions which were to be in issue during the second proceeding. The record states:

> THE COURT: ...I would suggest that you pick out the most recent ones and if you could avoid the two that are involved in the second stage you would probably be better off.
>
> THE PROSECUTOR: I can't do that for those are the two most recent ones so that's the way it has to be.
>
> THE COURT: Well, there's no rule that I know of that prohibits using those. It seems a little bit strange that they split the trial and made two stages of it with two aggravating or enhancing convictions or whatever you want to call them. [TE, 102-103.]
>
> * * * *
>
> LONNIE JOE CARTER: Are you saying the most

---

[1]Trial defense counsel did not object at the time of the police officers' testimony regarding petitioner's refusal to cooperate with the police. However, trial counsel's objection was overruled when the prosecutor mentioned during his opening statement the questioning of petitioner by the police officers [TE, 20]. Nevertheless, the Supreme Court of Kentucky held that the issue of comment upon petitioner's silence at the time of arrest was not properly preserved for review. Carter v. Commonwealth, Memorandum Opinion, slip opinion at 4-5 (May 13, 1980) [A, 4-5]. This alleged constitutional violation is not being raised in this petition.

[2]The Kentucky Supreme Court held that the police officer's failure to "scrupulously honor" petitioner's wish to remain silent was not preserved for review. Carter v. Commonwealth, supra at 3 [A, 3]. Again, this potential constitutional violation is not raised in this petition.

recent convictions?

THE COURT: Well, they are the ones he plans to use. Now, you do understand what you are charged with?

LONNIE JOE CARTER: Yes, sir.

THE COURT: All right, you talk to Mr. Rogers and then tell us what you want to do.

* * * *

THE COURT: Now, Lonnie, you have come back after a private conference with your lawyer, Mr. Rogers and you have told me you have decided not to take the stand?

LONNIE JOE CARTER: Yes, sir. [TE, 104.]

Petitioner did not testify and presented no other evidence. Defense counsel tendered, and the trial court refused, an instruction on petitioner's right not to testify. The instruction states:

> The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way. [TR, 22; A, 14.]

In closing argument, defense counsel argued to the jury:

> Why didn't Mr. Carter take the stand and testify? Let me tell you... He doesn't have to take the stand in his own behalf. He doesn't have to do anything. [TE, 108-109.]

In his closing argument, the prosecutor repeatedly referred to the evidence as "not controverted" [TE, 119-120]. He also argued: "Consider only what you have heard up here as evidence in this case and not something that you might speculate happened or could have happened..." [TE, 115].

Petitioner was convicted and sentenced to two years [TE, 127]. After the second phase of the trial, the jury found petitioner guilty as a persistent felony offender and sentenced him to the maximum, twenty years, ten years without parole [TE, 143].

On May 13, 1980, the Kentucky Supreme Court affirmed petitioner's conviction. The Court specifically rejected petitioner's argument that the Fifth and Fourteenth Amendments to the United States Constitution require that a protective instruction be given regarding a criminal defendant's right not to testify when a timely request is made at trial. The Court relied upon its previous decision in Green v. Commonwealth, Ky., 488 S.W.2d 339 (1972). Petitioner now seeks review of this decision by this Court.

REASON FOR GRANTING THE WRIT

THE OPINION BELOW CONFLICTS WITH THE RATIONALE OF PRIOR DECISIONS OF THIS COURT, INCLUDING BRUNO V. UNITED STATES, GRIFFIN V. CALIFORNIA AND LAKESIDE V. OREGON, AS WELL AS DECISIONS IN THE VAST MAJORITY OF JURISDICTIONS. THE PRESENT CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW SPECIFICALLY LEFT OPEN BY THIS COURT IN GRIFFIN.

A. THE QUESTION PRESENTED IS NARROW AND PROPERLY BEFORE THIS COURT

The question presented in this Petition is a narrow one. This Court is asked to decide whether, as a matter of due process, a state trial court must give a protective instruction upon timely request by defense counsel regarding a criminal defendant's right not to testify at trial. The question presented is properly before this Court because petitioner tendered an appropriate instruction at trial and the Kentucky Supreme Court specifically rejected petitioner's argument that "[t]he trial court's refusal to instruct the jury regarding appellant's right not to testify, in light of the facts of this case, violated the Fifth and Fourteenth Amendments...." Carter v. Commonwealth, supra at 5 [A, 5].

The present case presents an appropriate vehicle for deciding this important constitutional question because petitioner's argument is specifically related to the facts of his case. While petitioner asserts that the Fifth and Fourteenth Amendments require a protective instruction regarding the defendant's failure to testify in all cases where a timely request is made, petitioner submits that, as a constitutional minimum, the requested instruction should have been given under the facts of this case. The record reflects that petitioner did not testify for reasons unrelated to guilt or innocence. Petitioner was facing a first degree persistent felon charge which carries a mandatory sentence of ten years without parole. KRS 532.080(7). No harsher parole eligibility term exists under Kentucky law. Even a convicted murderer is eligible for parole after six years. Had petitioner testified, he would have had to admit the prior felonies which were to be in issue during the second proceeding.[3] The fact that petitioner chose not testify for reasons unrelated to guilt or innocence dramatizes the need in this case for a protective instruction.

Additionally, the prosecution made petitioner's refusal to cooperate with the police at the time of arrest a principle issue at trial. When petitioner failed to testify, it became clear to the jury that petitioner had never explained himself to anyone. During closing argument, defense counsel stated that petitioner

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[3]Kentucky employs a bifurcated proceeding in persistent felon cases. KRS 532.080(1).

"doesn't have to take the stand in his own behalf. He doesn't have to do anything" [TE, 108-109]. However, in the absence of a protective instruction, this correct statement of constitutional law was likely dismissed by the jurors as inaccurate and possibly perceived as arrogance. Furthermore, the prosecutor made indirect comments about petitioner's failure to testify. The unique facts of the present case suggest a compelling need for the protective instruction requested by petitioner. In light of these facts, petitioner submits that the present case would be an appropriate context in which to decide this important issue of federal constitutional law.

B. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

In Bruno v. United States, 308 U.S. 287 (1939), this Court held that an accused in a federal criminal case is entitled upon timely request to the substance of the cautionary instruction tendered by petitioner in the trial court. This Court based its holding solely upon interpretation of a federal statute. 28 U.S.C. § 632 (presently 18 U.S.C. § 3481). Mr. Justice Frankfurter noted that this Court had granted certiorari because the question presented was "an important question in the administration of federal criminal justice...." Id. at 291.

Subsequently, in Griffin v. California, 380 U.S. 609 (1965), this Court held that the Fifth Amendment forbids either comment by the prosecution on an accused's silence or instructions by the court that such silence is evidence of guilt. However, this Court also specifically stated:

> We reserve decision on whether an accused can require, as in Bruno v. United States... that the jury be instructed that his silence must be disregarded. Griffin, supra at 615, n.6.

Petitioner submits the question presented is an important federal constitutional question which should be decided, and can only be laid to rest, by this Court.

C. THE OPINION BELOW CONFLICTS WITH THE RATIONALE OF PREVIOUS DECISIONS OF THIS COURT

In Bruno v. United States, supra, this Court unanimously held that a criminal defendant in a federal trial has an absolute right to the protective instruction requested by petitioner below. While this Court's decision did not rest upon the Fifth Amendment, the rationale of the Bruno decision supports petitioner's contention. This Court implicitly recognized "the psychological operation of the jury's mind" in considering a criminal defendant's failure to

testify. Id. at 293. In interpreting a statute similar to Kentucky's, KRS 421.225, this Court indicated that:

> The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their judicial duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts. Id.

Petitioner would also submit that the rationale of Griffin v. California, supra, supports petitioner's contention. Mr. Justice Stewart, joined by Mr. Justice White, in dissent, pointed out:

> ...whenever in a jury trial a defendant exercises this constitutional right, the members of the jury are bound to draw inferences from his silence. No constitution can prevent the operation of the human mind. Without limiting instructions the danger exists that the inferences drawn by the jury may be unfairly broad. Some states have permitted this danger to go unchecked, by forbidding any comment at all upon the defendant's failure to take the witness stand. Id. at 623. [Emphasis added.]

The dissent in Griffin refers specifically to Kentucky as letting this danger "go unchecked" in footnote 9. Id.

Recently, in Lakeside v. Oregon, 435 U.S. 333 (1978), this Court specifically rejected the argument that the protective instruction requested here constituted "comment" within the meaning of Griffin. This Court noted that Griffin only condemned "adverse comment." Lakeside, supra at 339. This Court equated petitioner's requested "no inference" instruction with other basic instructions which must be given to insure due process of law:

> The very purpose of a jury charge is to flag the juror's attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege against compulsory self-incrimination is no different. Lakeside, supra, at 340. [Emphasis added.]

The protective instruction requested by petitioner in this case deals with an explicit constitutional right so fundamental in nature as to give rise to a due process violation when it is refused. In Taylor v. Kentucky, 436 U.S. 478 (1978), this Court held that under the circumstances of a particular case it was a due process violation for a state trial judge to refuse to instruct on another fundamental (although implied) constitutional right, the presumption of innocence. As in Taylor, "the ordinary citizen well may draw significant additional guidance from an instruction..." protective of the defendant's right not to testify. Id. at 484. Such an instruction would have a "salutary effect upon lay jurors." Id. The

requested instruction in the present case was "one way of impressing upon the jury the importance of" petitioner's constitutional right to remain silent. Id. at 485. Even the dissenting justices in Taylor noted that:

> In this case the omission [of the instruction] did not violate a specific constitutional guarantee such as the privilege against compulsory self-incrimination. Id. at 492. [Emphasis added.]

In the present case, the refusal of petitioner's requested instruction violated a specific right guaranteed to the defendant by the Fourteenth Amendment. Cf. Cupp v. Naughten, 414 U.S. 141, 146 (1973).

Petitioner submits that the rationale of these previous decisions of this Court conflicts with the opinion below.

D. THE OPINION BELOW AND THE RATIONALE OF KENTUCKY DECISIONS

The Kentucky Supreme Court affirmed petitioner's conviction and rejected the contention presented here on the basis of Green v. Commonwealth, Ky., 488 S.W.2d 339 (1972). The Kentucky Supreme Court has considered the issue presented on several occasions. The results reached by the Court, however, have not been consistent. In a number of early cases the Court condemned instructions of the type involved here. Tines v. Commonwealth, 25 Ky.Law Rep. 1233, 77 S.W. 363, 364 (1903); Armstrong v. Commonwealth, 190 Ky. 217, 227 S.W. 162, 163 (1921); Hanks v. Commonwealth, 248 Ky. 203, 58 S.W.2d 394, 395 (1933); Roberson v. Commonwealth, 274 Ky. 49, 118 S.W.2d 157, 158 (1938). In later cases, the Kentucky Court held that a defendant was entitled to the "no inference" instruction upon request. Kelley v. Commonwealth, 300 Ky. 136, 187 S.W.2d 796, 800 (1945). These cases were decided under statutes virtually identical to KRS 421.225, which states:

> 421.225 Testimony of defendant
>
> In any criminal or penal prosecution the defendant on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him.

In Spencer v. Commonwealth, Ky., 467 S.W.2d 128, 130-131 (1971), the Kentucky Supreme Court again construed KRS 421.225 as requiring the "no inference" instruction:

> Although our Kentucky Constitution does not specifically safeguard to the defendant an instruction on his failure to testify, we are of the opinion that in view of KRS 421.225(1) the defendant is entitled to an instruction when properly requested. Id. at 131.

Subsequently, however, the Kentucky Court again changed its position and repudiated this language in Scott v. Commonwealth, Ky., 495 S.W.2d 800, 802 (1973), as being mere dictum. In Green v. Commonwealth, supra, and the present case, the Kentucky Supreme Court also rejected contentions that a protective instruction is required. Green is based on the Kentucky Supreme Court's opinion that:

> ...the requested "no inference" instruction... would have been a direct "comment" by the court and would have emphasized the fact that the accused had not testified in his own behalf. Id. at 341.

This rationale, perhaps an overreaction to Griffin, was contradicted by this Court in the Lakeside decision. In Lakeside, this Court spoke of the purpose of the requested protective instruction:

> ...its very purpose is to remove from the jury's deliberations any influence of unspoken adverse inferences. It would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect. Id. at 339.

Petitioner submits that the position of the Kentucky Supreme Court is based upon what this Court called two "very doubtful...speculative...[and] dubious..." assumptions. Lakeside, supra at 340.

> First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own. Second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Id. [Footnotes omitted.]

Petitioner submits that the rationale of this Court in Lakeside is in direct conflict with the decision below.

E. THE DECISION BELOW CONFLICTS WITH THE VAST MAJORITY OF JURISDICTIONS

Without a doubt, the overwhelming majority of the courts in this country have required that jurors in criminal trials be given the cautionary instruction requested by petitioner below upon timely motion by defense counsel. An incomplete jurisdictional survey made be found in the appendix [A, 15-16]. The decision below is in conflict, not only with the position of this Court and all of the federal circuits, but at least thirty-two state jurisdictions [A, 15-16]. Petitioner's research has, thus far, disclosed only two other jurisdictions besides Kentucky which refused the "no inference" instruction [A, 16]. The requested instruction was essential to a fair trial in the present case. See Commonwealth v. Sullivan, 239 N.E.2d 5, 16 (Mass. 1968); State v. Garcia, 505 P.2d 862, 863-864

(N.M. 1972). In addition to the authorities listed in the appendix, see generally State v. Baxter, 454 P.2d 366, 367 (Haw. 1969); State v. Buchanan, 412 P.2d 565, 567 (N.M. 1966); State v. Emrick, 278 A.2d 712 (Vt. 1971). See also State v. Cook, 157 N.W.2d 151, 155 (Neb. 1968); People v. Gaulden, 111 Cal.Rptr. 803, 811 (1974); State v. Wallace, 152 N.W.2d 266, 270 (Iowa 1967).

Petitioner submits that the conflict between Kentucky and the vast majority of jurisdictions is an especially important reason for this Court to grant review of this significant constitutional question.

CONCLUSION

The present case presents the compelling, as of yet unresolved, constitutional question of whether, and under what circumstances, a state trial court must, upon timely request, give a protective instruction regarding a criminal defendant's right not to testify. This question has been left open for many years by this Court and the administration of justice would benefit from a final resolution of this question. The decision below conflicts with the rationale of prior decisions of this Court, the vast majority of jurisdictions which have decided the question and even past decisions by the Kentucky Supreme Court. For all the reasons stated above, a writ of certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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RENDERED: May 13, 1980
Not to be published

SUPREME COURT OF KENTUCKY
No. 79-SC-452-MR

LONNIE JOE CARTER — APPELLANT

V. — APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE STEPHEN P. WHITE, JUDGE
Indictment No. 79-CR-24

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION PER CURIAM

AFFIRMING

Lonnie Joe Carter, the appellant, was indicted by the February 1979, Christian County Grand Jury for third-degree burglary (KRS 511.040) of Young's Hardware Store in Hopkinsville, Kentucky. Appellant was also indicted as a persistent felony offender pursuant to KRS 532.080.

In the early hours of December 22, 1978, Officer Ellison of the Hopkinsville City Police Department, while on routine patrol through the downtown area, passed by the alley between Young's Hardware Store and Edna's Furniture Store and noticed something in the alley. When she flashed her spotlight down the alley she saw two black males kneeling in the alley. The men took off running and Officer Ellison radioed Officer Davis, who was also on patrol in the area. Officer Davis saw the two suspects running away and

took off after them. The two men split up. Officer Davis pursued and caught one of them. It turned out to be Lonnie Joe Carter, the appellant. During the course of the chase, the appellant dropped two objects, which turned out to be a gym bag and a police band portable radio. The appellant was wearing gloves but no jacket, despite the fact that it was a bitterly cold night.

After calling Officer Davis, Officer Ellison inspected the wall of the building and found a sizeable hole. She also noticed that some items of merchandise from inside the store had been removed and were in the alley. Also in the alley were two jackets. Upon hearing that Officer Davis had one of the men in custody, Officer Ellison went to where the man was being detained and noted that he had on the same color clothes as one of the men she had seen in the alley.

After being taken to police headquarters and being booked, the appellant was read his Miranda rights (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)) and was asked by Officers Ellison and Davis if he would like to sign the standard waiver form and make a statement. The appellant indicated that he understood his rights, but that he did not care to make a statement at that time. Shortly thereafter, Rusty A. Colon, a Major with the Hopkinsville Police Department, entered the room and started a conversation with the appellant, during which the appellant made certain incriminating statements which are in issue in this appeal.

A trial was held on May 17, 1979, in the Christian Circuit Court at which the appellant was found guilty of third-degree burglary

and of being a first-degree persistent felony offender. The appellant received sentences of two years and 20 years' imprisonment, respectively, for these convictions. On this appeal nine alleged errors are presented.

I

> "Appellant has been denied his rights against compulsory self-incrimination and to counsel in violation of the 5th, 6th and 14th amendments to the United States Constitution and Section 11 of the Kentucky Constitution when the police failed to 'scrupulously honor' his decision to remain silent."

The record reflects that the appellant was, promptly after his arrest, advised of his Miranda rights by Officer Ellison. During her interrogation by the Commonwealth, Officer Ellison explained that the appellant refused to waive his Miranda rights, refused to make a statement, and requested a lawyer. Shortly thereafter, Major Colon, in the absence of the other officers, talked to appellant for a few minutes about the crime. Counsel for appellant did not object to this line of interrogation and, as a matter of fact, in his cross-examination pursued the same line of inquiry.

In Spillman v. Commonwealth, Ky., 465 S.W. 2d 925 (1971), this court was confronted with a situation similar to that now presented. In disposing of the issue, we said, "(t)he failure to raise the question in the trial court precludes its consideration on appeal."

The appellant made no objection; consequently, the issue was not preserved for appellate review.

II

"Testimony by Officers Ellison and Davis that appellant refused to answer police questions and introduction of a Miranda waiver form indicating appellant refused to waive his rights deprived appellant of his federal and state constitutional rights to remain silent."

Counsel for appellant argues that in spite of his Miranda protection, the length of time it was brought to the attention of the jury constitutes a violation of this protection. We need not reach this charge since no objection was made at the time the issue first presented itself. Spillman v. Commonwealth, supra. The one and only objection made by appellant's counsel had nothing to do with Miranda-rights protection. It pertained to hearsay evidence contained in an answer. The Commonwealth's Attorney asked Officer Ellison whether she had any conversation with the appellant about this crime. The following is reflected by the record:

"A. No, sir, when we brought him down to the station he didn't want to say anything. There was another officer there who did say something about whose coats they were and Mr. Carter said that they were his coats.

Objection by Hon. W. E. Rogers, III:

Judge, I object to the hearsay.

The Court:

Yes, that is hearsay testimony and I believe you will have to get that from another party."

The court sustained the objection, and no request for an admonition was sought and none was given by the court. Evidently, counsel for appellant was satisfied with having his objection sustain-

ed without having the court admonish the jury. In this situation the issue is not preserved for appellate review. Brock v. Commonwealth, Ky., 391 S.W. 2d 690 (1965).

III

> "The trial court denied appellant due process of law and a fair trial by failing to hold an evidentiary hearing, out of the presence of the jury, regarding appellant's incriminating statements pursuant to RCr 9.78."

Counsel for appellant argues that RCr 9.78 mandates that the trial judge hold a hearing out of the presence of the jury before admitting incriminatory statements which were supposed to have been made by appellant after having been given his Miranda warning. RCr 9.78 provides that if there is a timely objection made to such testimony, then, and in that event, the court must hold such a hearing. In this case there was no objection. The objection to which counsel for appellant makes reference appears in the Commonwealth's Attorney's opening statement to the jury. Remarks made by the Commonwealth's Attorney in his opening statement are what he expects to prove. Objections to such statements do not obviate a challenge when the objectionable line of testimony is sought to be pursued in the course of the trial. The opening statement does not constitute the admission of evidence within the terms of RCr 9.78. This issue was not preserved for appellate review.

IV

> "The trial court's refusal to instruct the jury regarding appellant's right not to testify, in light of the facts of this case, violated the 5th and 14th amendments and Section 11 of the Kentucky Constitution."

The appellant did not testify. His counsel argues in the alternative, the appellant was entitled to an instruction on his right to remain silent and not testify or if he is not entitled to such an instruction then, and in that event, the comments of the Commonwealth's Attorney in his closing summation to the jury concerning appellant's failure to testify were prejudicial error.

KRS 421.225 provides:

> "Testimony of defendant.- In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him."

In Green v. Commonwealth, Ky., 488 S.W. 2d 339 (1972), this court had under consideration a request by an accused that the court instruct the jury that no inference of guilt should be drawn from his failure to testify. This question was considered by this court and we concluded that, "(t)he trial court did not err in refusing to give Green's requested instruction."

Appellant's latter argument that the comments of the Commonwealth's Attorney in his closing statement to the jury were prejudicially erroneous is no more meritorious than the argument for an instruction on his failure to testify. Counsel for appellant was afforded the privilege of making the first summation to the jury. The Commonwealth's Attorney was then afforded the privilege of concluding the arguments, readying the submission of the case to the jury for its consideration. The closing summation for the appellant commences as follows:

"Ladies and Gentlemen of the Jury, I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify? Let me tell you. * * * He doesn't have to take the stand in his own behalf. He doesn't have to do anything. * * *"

The comments of the appellant's attorney were an invitation for the Commonwealth's Attorney to attack, which he did. The error on the part of the court, if any, was at the invitation of appellant and he will not now be heard to complain. Wright v. Jackson, Ky., 329 S.W. 2d 560 (1959). Irrespective of the characterization made by appellant's counsel of the Commonwealth's Attorney's closing argument, there was no objection made to any of it. It is now too late to cry foul.

V

"The trial court abused its discretion and denied appellant due process of law by permitting the Commonwealth to impeach appellant with prior felonies which were in issue during the second (P.F.O.) phase of the trial."

It is clear that the appellant did not take the stand; consequently, there was no impeachment.

The appellant also argues that after he had been found guilty of the primary offense, third-degree burglary, the court should have impanelled a new jury to hear the persistent felony charge. This argument was discussed in Brown v. Commonwealth, Ky., 551 S.W. 2d 557 (1977). We hold to the contrary. The trial court did not err in this respect.

VI

"The trial court denied appellant due process of law by refusing to declare a mistrial and by refusing to exclude incriminating statements when it became clear that the prosecutor had not disclosed physical evidence and incriminating statements as requested."

Appellant filed a request for a bill of particulars on February 28, 1979. One of the requests was "A copy of any statement, written or oral, made by the Defendant or any co-defendants." In response, the Commonwealth's Attorney answered "None." The incriminating statements to which counsel for appellant now refers are those to which the Commonwealth's Attorney made mention in his opening statement. We have heretofore opined that the issue as to the competency of the incriminating statements was not properly preserved for appellate review since appellant's counsel had not objected when the questioned testimony was offered.

The request for the bill of particulars filed was sufficiently broad in other sections thereof to have required that their existence and the intent of the Commonwealth's Attorney to use them on trial should have been disclosed to counsel for appellant with the other disclosures. This was not done. The existence of the gloves was made known in the testimony of Officer Davis and was pursued in the cross-examination by appellant's counsel. No objection was made when the question arose; however, at the conclusion of Officer Davis' testimony, appellant's counsel made a motion for a mistrial, which was denied. Objections to a particular question or to a particular line of interrogation must

be made when the testimony is offered. No objection was made when Officer Davis disclosed the existence of the gloves. The objection was first made after this witness had been interrogated both by the Commonwealth's Attorney and the appellant's counsel. Appellant cannot now complain.

VII

"The trial court denied appellant due process of law by instructing the jury that pre-trial incarceration would count toward any sentence imposed and by refusing to instruct the jury regarding the ten year mandatory sentence without parole for first degree persistent felons.

A. Pre-trial incarceration"

In appellant's closing argument to the jury his counsel said:

"Now, I want to tell you something. The police and the prosecution and the state are not helpless. Now, this man (again pointing to defendant) is helpless. He has been in jail five (5) months while they have had the laboratories and the investigators and that's good; I am glad that we have that. * * *"

After the case was submitted to the jury for a verdict, the jurors returned into open court and asked:

"We would like to know if time served now will be included in the sentence or if...

The Court:

Do you mean to be asking me whether or not he will be given credit for that time? Is that what you are saying?

Terry Hamby - one of the jurors:

Yes, sir.

The Court:

Let me say to you, Ladies and Gentlemen, that ordinarily I wouldn't answer that question except for one fact and that is, his confinement in the local jail prior to his trial, I believe it was five (5) months or something of that sort, was mentioned in the final argument in the case. That is where you got it. If that had not happened I think probably I would not be permitted to answer your question, but since it happened in the way it did I am simply going to tell you that under Kentucky Revised Statutes, Section 532.120, subsection 3, reads as follows:

'Time spent in custody prior to commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the Court imposing sentence towards the serving of the maximum term of imprisonment.'

That's the end of the quotation but to simplify that, to bring it down to what you and I understand, 'yes, he gets credit for time served.'"

After the jury returned to the jury room, counsel for appellant and the trial judge had the following colloquy:

"Motion by Hon. W. E. Rogers, III:

Judge, I object to that request and move for a mistrial on that basis.

The Court:

I will overrule the motion. Mr. Rogers, you are the one that brought up the five (5) months that defendant has been in jail."

The error, if any there was, on the part of the trial judge was invited by appellant's counsel and he cannot now complain.

"B. Mandatory No-Parole Term"

At the conclusion of the persistent felony phase of the trial, counsel for appellant requested the court to inform the jurors

that under the law a conviction of being a persistent felon would prohibit the defendant from receiving probation or parole and they should take that into consideration in setting their sentence. KRS 532.080(7). The court refused to give such an admonition to the jury. The function of the jury is to determine guilt or innocence and to determine sentence if guilt is found. The possibility of pardon or parole is not a proper consideration for the jury in making its determination. In fact, the entire matter of parole is beyond the province of the jury. Brown v. Commonwealth, Ky., 445 S.W. 2d 845 (1969); Green v. Commonwealth, Ky., 556 S.W. 2d 684 (1977). Since the entire matter of parole is beyond the province of the jury, it is clear that the trial judge is under no obligation to instruct the jury on this matter.

VIII

> "Appellant was denied due process by the failure of the trial judge to instruct as requested by the defense that the Commonwealth had the burden to prove each essential element beyond a reasonable doubt."

The trial court in instructing on reasonable doubt said:

> "You will find the defendant guilty if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (a) That in this County on or about the 22nd day of December, 1978, and before the finding of the indictment herein, he entered the store building known as Young's Hardware at 112 East 6th Street in the City of Hopkinsville without permission from the owner or any other person authorized to give such permission;
>
> (b) That in so doing he did not have such permission;
>
> and

(c) That he did so with intention of committing a theft."

The appellant argues that the court should have instructed the jury that it must believe each element of the offense beyond a reasonable doubt before a conviction can be had rather than relying on the preliminary statement of reasonable doubt to apply to each element of the offense. We are of the opinion that today's jurors are sophisticated enough to realize that the reasonable doubt qualification given at the beginning of each separate instruction applies with equal force to each element of the offense thereafter set forth in that instruction. The instructions given by the court properly presented the reasonable doubt requirement.

IX

"Appellant was denied due process of law in violation of the 14th amendment by the entire P.F.O. hearing, because there was no proof, or instructions on, essential elements of the offense, no instruction on 2nd degree PFO, evidence of other unrelated charges and/or another conviction, and an admission of guilt by counsel without an on the record inquiry of appellant."

This argument is directed solely at the persistent felony phase of the trial. Appellant now complains that, (1) the circuit court clerk read to the jury from the indictments; (2) there was no proof of at least two essential elements of the crime with which the appellant was charged; (3) the essential elements of the offense were omitted from the court's instructions; and (4) the instructions did not afford the jury the privilege of determining whether the appellant had committed only one of the previous convictions.

Counsel for appellant did not offer any objection to the clerk's reading from the indictments, nor to the failure of the proof, nor to the instructions themselves. The integrity of the appellant in admitting what the Commonwealth had already proved does not detract from his plea for mercy for appellant. It logically would improve the appellant's chances for a minimum sentence from the jury.

When the alleged errors are stacked one on top of the other, it appears to us that the appellant received a fair trial, at least a tolerably fair trial. Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974); McDonald v. Commonwealth, Ky., 554 S.W. 2d 84 (1977); Berning v. Commonwealth, Ky., 550 S.W. 2d 561 (1977).

The judgment is affirmed.

All concur, except Stephens, J., who did not sit.

COUNSEL FOR APPELLANT:

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COUNSEL FOR APPELLEE:

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Frankfort, Ky. 40601

5-17-99 offered by the defendant and refused by the Court! Judge Stephen D. Clardy

Instruction Re: Defendants Testimony

The D is not compelled to Testify and the fact that he does not cannot be used as an influence of guilt and should not prejudice him in any way.

Burden of Proof

In a Criminal case, the burden of proof always rests upon the prosecution. The defendant is under no obligation to prove anything. The Prosecution must prove every Element of its case beyond a reasonable doubt.

Circumstantial Evidence -

An influence may not be built upon an influence.

APPENDIX A

JURISDICTIONS WHICH HAVE RECOGNIZED THE PROPRIETY OF A "NO INFERENCE" INSTRUCTION

I. FEDERAL

1. Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed 257 (1939)
2. United States v. Williams, 521 F.2d 950, 955 (D.C. Cir. 1975)
3. United States v. Schabert, 362 F.2d 369, 372 (2nd Cir. 1966)
4. United States v. English, 409 F.2d 200, 201 (3rd Cir. 1969)
5. United States v. Smith 392 F.2d 302, 303 (4th Cir. 1968)
6. Wilkins v. United States, 376 F.2d 552, 563 (5th Cir. 1967)
7. United States v. Goble, 512 F.2d 458, 470 (6th Cir. 1975)
8. United States v. Rimanich, 422 F.2d 817, 818 (7th Cir. 1970)
9. Caton v. United States, 407 F.2d 367, 374-375 (8th Cir. 1969)
10. United States v. Gustave, 424 F.2d 539, 540 (9th Cir. 1970)
11. Hanks v. United States, 388 F.2d 171, 175 (10th Cir. 1968)

II. STATE

1. Swindle v. State, 279 So.2d 574, 575 (Ala. 1973)
2. State v. Wheeler, 498 P.2d 205, 208 (Ariz. 1972)
3. Powell v. State, 471 S.W.2d 333, 338 (Ark. 1971)
4. People v. Gaulden, 111 Cal.Rptr. 803, 811 (1974)
5. Kimmel v. People, 473 P.2d 167 (Colo. 1970)
6. State Adinolfi, 253 A.2d 34, 35 (Conn. 1968)
7. DeLaine v. State 230 So.2d 168, 175 (Fla. 1970)
8. Clay v. State, 224 S.E.2d 14 (Ga. 1976)
9. Gross v. State, 306 N.E.2d 371, 372-373 (Ind. 1974)
10. State v. Wallace, 152 N.E.2d 266, 270 (Iowa 1967)
11. State v. Kowalec, 468 P.2d 221, 224 (Kan. 1970)
12. Kelley v. Commonwealth, 300 Ky. 136, 187 S.W.2d 796, 800 (1945)
13. State v. Chapman, 358 A.2d 387, 391 (Maine 1976)
14. Pearson v. State, 343 A.2d 916, 920 (Maryland 1975)
15. Commonwealth v. Sullivan, 239 N.E.2d 5, 16 (Mass. 1968)

16. People v. Chambers, 236 N.W.2d 702, 703 (Mich. 1975)
17. State v. Rosen, 158 N.W.2d 202 (Minn. 1968)
18. State v. Baker, 524 S.W.2d 122 (Missouri 1975)
19. State v. Cook, 157 N.W.2d 151, 155 (Neb. 1968)
20. State v. Guibilio, 353 A.2d 165, 169 (N.J. 1976)
21. State v. Garcia, 505 P.2d 862, 863-864 (N.M. 1972)
22. People v. Britt, 383 N.Y.S.2d 602, 603 (1976)
23. State v. Alston, 217 S.E.2d 207, 209 (N.C. 1975)
24. State v. Nelson, 303 N.E.2d 865 (Ohio 1973)
25. State v. Lakeside, 549 P.2d 1287, 1288 (Oregon 1976)
26. Commonwealth v. Danzy, 310 A.2d 291, 292-293 (Pa. 1973)
27. State v. Caron, 219 N.E.2d 68, 71-72 (S.C. 1975)
28. State v. Oswald, 241 N.W.2d 566, 570 (S.D. 1976)
29. Jaffrion v. State, 501 S.W.2d 322, 326 (Texas 1973)
30. State v. Persuitti, 346 A.2d 208, 209 (Vermont 1975)
31. State v. Goldstein, 400 P.2d 368, 369 (Wash. 1965)
32. Champlain v. State, 193 N.W.2d 868, 873 (Wis. 1972)

APPENDIX B

JURISDICTIONS WHICH PRECLUDE THE "NO INFERENCE" INSTRUCTION

1. Green v. Commonwealth, Ky., 488 S.W.2d 339 (1972)
2. McNeeley v. State, 409 P.2d 135 (Nev. 1965)
3. Brannin v. State, 375 P.2d 276 (Oklahoma 1962)

No. 80-5060

In the Supreme Court of the United States

OCTOBER TERM, 1980

LONNIE JOE CARTER,

Petitioner,

—*v.*—

COMMONWEALTH OF KENTUCKY,

Respondent,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 17, 1980
CERTIORARI GRANTED OCTOBER 6, 1980

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	DOCKET ITEM

February 1, 1979– Lonnie Joe Carter was indicted by the Christian County Grand Jury for third degree burglary, allegedly committed on December 22, 1978, and for being a persistent felony offender.

May 17, 1979—Lonnie Joe Carter was tried by a jury and convicted of third degree burglary and of being a persistent felony offender in the first degree. Petitioner was sentenced by the jury to twenty years imprisonment.

June 1, 1979—Lonnie Joe Carter was sentenced to twenty years imprisonment. Final judgment entered by the Christian Circuit Court.

June 5, 1979—Lonnie Joe Carter filed a notice of appeal to the Supreme Court of Kentucky.

May 13, 1980—Supreme Court of Kentucky renders its opinion in Mr. Carter's case and affirms his conviction.

June 3, 1980—Supreme Court of Kentucky issues mandate in Lonnie Joe Carter's case.

CHRISTIAN CIRCUIT COURT

Ind. No. 79-CR-24

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

LONNIE JOE CARTER, DEFENDANT

TRANSCRIPT OF RECORD

CHRISTIAN CIRCUIT COURT

Indictment No. 79-CR-24

COUNT 1.

COMMONWEALTH OF KENTUCKY

vs.

LONNIE JOE CARTER, DEFENDANT(S)

KRS 511.040—Third Degree Burglary

532.080—Persistent Felony Offender

The grand jury charges:

On or about the 22nd day of December, 1978, in Christian County, Kentucky, the above named defendant(s) committed the offense of Third Degree Burglary by unlawfully entering the store building known as Young Hardware, with intent to commit a crime;

The Grand Jury further charges that the above named defendant has previously been convicted of 2 felonies; (1) Storehouse Breaking in Hopkinsville, Kentucky, for which crime he was sentenced to the State Penitentiary at Eddyville, Kentucky, on November 2, 1973, for a period of 3 years; (2) Knowingly Receiving Stolen Property Over $100.00 in Hopkinsville, Kentucky, for which crime he was sentenced to the State Penitentiary at Eddyville, Kentucky, on May 20, 1977, for a period of 5 years; that said prior convictions and Judgments are in full force and effect, never having been modified, vacated, appealed from or set aside; that the above named defendant is a Persistent Felony Offender under KRS

532.080 against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

/s/ [Illegible]
Foreman

Bail $10,000.00 cash or prop. jail.

Presented by the Foreman of the Grand Jury to the said court in the presence of the entire Grand Jury and received from the Court by me and filed in open court this 1st day of February, 1979.

/s/ Jack Haddock
Clerk

WITNESSES

Off. Davis & Ellison
Mr. MacArthur

by /s/ Kathleen G. Restau
D.C.

Felix
17 Nov. 1939
Lee Haskell. Dec

5th "39 offered by the defendant and refused by the Court. Judge Stephen P. Murphy Jr.

Instruction Re: Defendants Testimony

The d is not compelled to Testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.

Burden of Proof.

In a Criminal case, the burden of proof always rests upon the prosecution The defendant is under no obligation to prove anything. The Prosecution must prove every element of its case beyond a reasonable doubt.

Circumstantial Evidence –

An inference may not be built upon an inference.

CHRISTIAN CIRCUIT COURT

Indictment No. 79-CR-24

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs:

LONNIE JOE CARTER, DEFENDANT

JURY INSTRUCTIONS THIRD DEGREE BURGLARY

I

You will find the defendant guilty if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this County on or about the 22nd day of December, 1978, and before the finding of the indictment herein, he entered the store building known as Young's Hardware at 112 East 6th Street in the City of Hopkinsville without permission from the owner or any other person authorized to give such permission;

(b) That in so doing he did not have such permission; mission;

AND

(c) That he did so with intention of committing a theft.

If the jury find the defendant guilty under this instruction you will fix his punishment at confinement in the penitentiary for not less than one (1) year and nor more than 5 years, in your discretion.

/s/ Stephen P. White, Jr.
Judge
Christian Circuit Court

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II

The law presumes a defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

/s/ Stephen P. White, Jr.
Judge
Christian Circuit Court

The verdict of the jury must be unanimous and be signed by one of you as foreman. You may use one of the forms provided at the end of these instructions in writing your verdict.

(a) We the jury find the defendant not guilty.

_____
Foreman

(b) We the jury find the defendant guilty and fix his punishment at 2 year(s) in the penitentiary.

/s/ Terry W. Hamby
Foreman

CHRISTIAN CIRCUIT COURT

Hopkinsville, Ky, Date June 1, 1979

THE COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

LONNIE JOE CARTER, DEFENDANT

JUDGMENT: On Indictment No. 79-CR-24

Count #1—THIRD DEGREE BURGLARY

Count #2—PERSISTENT FELONY OFFENDER

The defendant was this day brought into Court, was asked if he had any legal cause to show why judgment should not be pronounced against him; upon advice of counsel, W. E. Rogers, III, who was present at sentenc-

_____

Attorney's name

ing, none being shown, it is adjudged that the defendant being 35 years of age, be taken by the Sheriff of Christian County, to the jail of Christian County and from there by the Sheriff of said county transferred to the custody of the Department of Corrections and to remain in their custody for the period of TWO (2) years on Count #1—TWENTY (20) years on Count #2—Sentence on Count #1 and Count #2 merged—Total—20 years. The Sheriff of said County shall transfer the defendant to the Department of Corrections at such location as the Department shall designate.

PROBATION DENIED. DEFENDANT TO RECEIVE CREDIT FOR 161 DAYS JAIL, EXCLUDING June 1, 1979.

(If this sentence is to run concurrently or consecutively with any other sentence, please complete the following) This sentence is to run.....with the

concurrently/consecutively

sentence of Indictment No. ..... of the ..... Circuit Court.

/s/ Stephen P. White, Jr.
Judge
Christian Circuit Court

I, Jack Haddock, Clerk of the Christian Circuit Court, do hereby certify that the foregoing judgment is a true and correct copy of the Judgment in the above styled case, entered on June 1, 1979.

Witness my hand as Clerk of the Christian Circuit Court, this June 1, 1979.

Jack Haddock
Circuit Court Clerk

By /s/ Kathleen G. Restau
D.C.

CHRISTIAN CIRCUIT COURT

Ind. No. 79-CR-24

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

LONNIE JOE CARTER, DEFENDANT

TRANSCRIPT OF TRIAL

* * * *

[4] VOIRE DIRE EXAMINATION BY THE COURT:

Ladies and Gentlemen, as you heard me say in the beginning, this is a charge—an indictment against Lonnie Joe Carter who is the black man sitting next to his attorney there, Mr. Rogers. Mr. Carter has on a dark blue suit. He is charged with third degree burglary in this way. That on or about the 22nd day of December, 1978, in Christian County, Kentucky, he committed that offense by unlawfully entering the store building known as Young Hardware with the intent to commit a crime.

Q Now, Ladies and Gentlemen, let me ask you first the most obvious question. As you can see for yourself, this defendant is of another race and I want to know if any one of you 25 on account of that fact feel that you cannot give him a fair trial?

A All 25 jurors nodded they could.

Q Ladies and Gentlemen, you have heard me read what the charge involved. Do any of you know anything about the facts of this case? Have you read about it in the newspaper or heard about it on the radio or heard about it from street talk or from any source at all?

[5] A All 25 jurors nodded they had not.

Q Now, Ladies and Gentlemen, the defendant is represented by Mr. W. E. Rogers, III who sits there next to him. Has Mr. Rogers done any legal work for any one of you 25 people?

A 24 jurors nodded negatively; 1 juror, C. H. Grace advised that he had prepared income tax returns for him.

Q How far back was that, sir?

A How far back?

Q Yes, sir?

A C. H. Grace: Oh, about 3 years, I guess.

Q Would that have any effect on your opinion in this case? Can you confine your judgment to the facts and the law as you hear them here in the courtroom?

A C. H. Grace: Yes, sir.

Q You can lay that aside?

A C. H. Grace: Yes, sir.

Q The case will be prosecuted for the Commonwealth of Kentucky by Mr. Ruff and Mr. Kemp. Have either one of them done any legal work for any member of this panel?

A All 25 jurors nodded negatively.

Q Are any of you related by blood or marriage to Lonnie Joe Carter?

[6] A All 25 jurors nodded negatively.

Q Do any of you know Lonnie Joe Carter?

A All 25 jurors nodded negatively.

Q Are any of you related by blood or marriage to either Mr. Rogers, or Mr. Kemp or Mr. Ruff?

A All 25 jurors nodded negatively.

Q Now, have any of you people on the panel been the victims of any sort of crime or had any member of your family the victim of a crime?

A 24 jurors nodded negatively; 1 juror, Mary Rogers: My brother got killed in '76.

Q Here in this county?

A Mary Rogers: Yes, sir.

Q What is your name, please, mam?

A Mary Rogers.

Q Mary Rogers?

A Mary Rogers: Yes, sir.

Q Mrs. Rogers?

A Mary Rogers: Yes, sir.

Q Would that fact have any sort of bearing on your judgment in this case?

A Mary Rogers: No, sir.

Q It is obviously not connected with it in any way? But aside from that, would that influence your judgment either for or against this man in the trial of [7] this case?

A Mary Rogers: No, sir.

Q Anybody else?

A All other 24 jurors nodded negatively.

Q Have any of you 25 had members of your family or yourselves connected with any law enforcement agency, such as Sheriff's Department, City Police, State Police, or any other law agency?

A 22 jurors nodded negatively; Larry Kisselbaugh: My uncle is Sheriff of Logan County.

Q Your uncle is Sheriff of Logan County?

A Larry Kisselbaugh: Yes, sir.

Q Would that affect your judgment in any way, Mr. Kisselbaugh?

A Larry Kisselbaugh: No, sir.

Q Do you have any such—by reason of that any such prejudice against the defendant or in favor of what a law enforcement officer may say on the witness stand?

A Larry Kisselbaugh: No, sir.

Q You have an unbiased opinion in this case? You can be as fair to him as to the other side?

A Larry Kisselbaugh: Yes, sir.

A Linda Davidson: My brother-in-law used to be a Deputy Sheriff.

[8] Q He used to be a Deputy Sheriff?

A Linda Davidson: Yes, sir.

Q Who was he?

A Charlie Cooke.

Q Would that have any bearing on your judgment in this case?

A Linda Davidson: No.

Q Now, Ladies and Gentlemen, as you may have heard me explain before in the courtroom and you will find this in the jury instructions, the 12 of you that will eventually try this case. The fact that this man is under a charge or has been indicted has no weight against him as evidence. It is not evidence of his guilt and is not to be considered by you as evidence of his guilt. It is simply a part of the court process which starts, as I have said, the wheels turning to get the case started to be tried. It means nothing more than that. He sits there before you today presumed by the law to be as innocent

as anyone else in this courtroom. I want you to fully understand that. Sometimes it is not easy to do, but you are to put out of your mind the fact that he is accused of this crime to the point where you will consider him in any way guilty until and unless the Commonwealth meets its burden and by [9] that I mean the Commonwealth must prove his guilt to your satisfaction beyond a reasonable doubt and if they fail to do that, you should find him not guilty. Now, reasonable doubt means exactly what it says. There's nothing technical about it and it shouldn't give anybody any trouble. The 12 of you that wind up hearing this case when you hear all of the evidence and any one of you has a reasonable doubt as to his guilt, it is your duty to find him not guilty and it works the other way around. If the 12 of you are satisfied beyond a reasonable doubt from the evidence that he is guilty, then you should find him guilty. I might say further that though the 12 of you finally chosen, you make up a body of people, you are still individuals and you are entitled to and you are expected to reach your own individual opinion about this case back in the jury room. You are free to discuss it back there and argue with each other and listen to what the rest of the panel says and pay whatever attention you choose to what the rest say but you are still individuals and you are entitled to cast your own separate vote as to his guilt or innocence and that is your duty.

A All 25 jurors nodded affirmatively.

[10] Q Now, Ladies and Gentlemen, is there anything that I have not thought of that would bring out something in the back of your mind which you think would disqualify you in sitting in this case and giving this man a fair trial and the Commonwealth a fair trial, based solely on the evidence you hear in court, the Court's instructions and the argument of counsel? Sometimes there is something in your background that, of course, I don't know about and I don't ask these questions out

of curiosity, I am just trying to get a fair and impartial jury to try this case, as we do in all cases?

A All 25 jurors nodded in agreement to what the Court said.

THE COURT: Mr. Rogers and Mr. Kemp, will you step up here?

WHEREUPON, Mr. Rogers and Mr. Kemp approached the bench at which time the Court asked both counsel if there were any further questions that they wished him to ask the 25 prospective jurors to which counsel for both sides advised the Court that they had no other questions to be asked.

THE COURT: Gentlemen, I think the jury is qualified, and under the law the Commonwealth must first exercise its challenges.

* * * *

[22] OPENING STATEMENT TO THE JURY

BY HON. W. E. ROGERS, III:

Ladies and Gentlemen, my name is W. E. Rogers and I represent Lonnie Joe Carter.

Let me tell you a little bit about how this system works. If you listened to Mr. Ruff you are probably ready to put Lonnie Joe in the penitentiary. He read you a bill, a true bill that was issued by the Grand Jury. Now, the Grand Jury is a group of people that meet back here in a room and the defendant is not able or not allowed to present any of his testimony before this group of people. The only thing that the Grand Jury hears is the prosecution's proof and I would say approximately what Mr. Ruff has said to you. I suppose that most of you would issue a true bill if Mr. Ruff told you what he has just told you and you didn't have a chance to hear what the defendant had to say for himself.

Now, that is just completely contrary to our system of law. A man, as the Judge has already told you, a person is innocent until they are proved guilty and that's the duty of the prosecutor, to prove beyond a reasonable doubt to you that this man is guilty of the crime for which he is charged. Now that means that they got to prove beyond a reasonable doubt that Lonnie Joe Carter put his hand in [23] this hole in the side of the wall and took some objects out, on this particular night. As they will and as you have heard, they have got a lot of pieces tied up here but there are a lot of pieces that are missing too, a lot of links are missing. And, also, a good bit of testimony that they will present, I think, you will find that it is subject to interpretation and, also, some of the testimony that they will present to you, you have got to use your own judgment as to whether or not identifications have been made beyond a reasonable doubt.

So I ask you to remember one thing, that this is your duty as a citizen of this country being on the jury and remember that our system and probably the corner stone of it allows, or says that a person is innocent until they are proved guilty. Listen to this case with an open mind all the way through it and don't make up your mind until you have gone back into the room and until all of the evidence is in and I think if you will do that, that is all we can ask.

Thank you.

THE COURT: Mr. Ruff, you may call your first witness.

HON. GRADY RUFF: Judge, we call Officer Ellison.

[24] TESTIMONY FOR COMMONWEALTH:

DEBORAH K. ELLISON

Having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY HON. GRADY RUFF:

Q Would you state your name to the jury, please?
A Officer Deborah K. Ellison.
Q Who do you work for, Miss Ellison?
A Hopkinsville Police Department.
Q How long have you been on the police department?
A About twenty (20) months.
Q Twenty (20) months?
A Yes, sir.
Q Miss Ellison, were you on duty on December 22, 1978, in the early morning hours?
A Yes, sir, I was.
Q What were you doing?
A I was on town patrol area.
Q Tell us what is town patrol?
A O.K. Town patrol covers the main downtown areas of the city and that was my area that night to cover.
Q I want to call your attention, Miss Ellison, to a [25] little bit before 2:00 a.m., say 1:50, somewhere around in there. What were the traffic conditions downtown? Was there anybody downtown to speak of?
A Well, there were several people on Virginia Street where the bars are but the majority of downtown was quiet.
Q And where were you about 1:50?
A I was on Sixth Street in between Main and Virginia.
Q And what were you doing?
A Just checking buildings; that's what our usual function is, just looking at buildings and making sure

the glass and everything is secured and the doors are secured.

Q Well, tell the jury then if anything unusual happened on that particular time.

A I was driving toward Virginia Street on Sixth at the time and I was going back and forth checking the doors and windows and I happened to look down the alleyway between Young Hardware Store and Edna's Furniture Store and I saw something but I didn't know what it was and I had to back the car up to take a better look at it and I hit the spotlight and shined it down the alleyway and I [26] saw two black males that were stooped along the side of the building. When they saw me they stood up and they both took off running north toward Fifth Street and I maneuvered the cruiser down through the alley to see what they were doing and I saw a hole knocked in the side of Young Hardware Store and I called for Officer Davis for I knew that he was in that area for I had just seen him and I tried to pursue the individuals. I took off through the alleyway, like I said, and there were two subjects, one was tall and thin, and was wearing rust colored slacks and a dark colored shirt and he was carrying some items in his hand and the other subject was short and stocky and he had a light colored type jersey shirt on and black slacks, or dark colored slacks anyway, and I went down the alley, like I said, after I called Officer Davis and the short subject he just disappeared. I lost track of him some time when I was looking at the hole in the side of the building. The other subject, the tall and thin one, he jumped through—there's a chain that runs across Mason-Pontiac lot—he jumped that [27] and he went down through the Mason-Pontiac lot toward Fourth Street and I was trying to get the car turned around to get back on to Virginia to cut him off at Fourth and when I came around there I had lost sight of him completely and I heard Officer Davis say that he had

the subject in custody at that time so I went back to the scene at Young Hardware.

Q How long would you say this took in minutes or seconds, Miss Ellison?

A It all happened, I would say, probably in less than three minutes. It took no time at all, less than two, maybe; it was quick.

Q Almost immediately, is that correct?

A Yes, sir.

Q Then you went back to the building, to the hole in the building, after you heard that Officer Davis had some one in custody, is that what you said you did?

A Yes, sir.

Q What did you find when you got back there?

A Well, when I had gone through the alley before there were some items lying there but I didn't know what they were and when I went back to the scene there were two coats laying [28] there and some items that were believed to be from the store and I called out to the—on the radio and they called Mack Arthur from Young Hardware and he came out and he identified the items that were laying on the ground as being from the store. They had come off the shelves there from inside, right inside the hole.

Q What did you do with the items and the jackets?

A The jackets I put—well, I tagged for evidence as—well, they were laying at the scene—they were part of the evidence of the crime and the other items I tagged and marked and we locked everything up in a vault.

Q Have they been at the police station ever since this happened?

A Yes, sir, they have been.

Q Do you have them with you this morning?

A Yes, sir.

Q I will hand you this bag and ask you what is in there (handing same to witness)?

A (Looking at plastic bag) It is a brown suede type coat.

Q Would you look at that, please, and see if you can identify it?

[29] A (Looking at same) Yes, sir that jacket was laying on the ground.

Q That is one of the jackets that was found there?

A Yes, sir.

Q Now, would you examine this one (exhibiting another jacket)? Can you identify that?

A (Looking at same) Yes, sir, that's the other one that was laying on the ground.

Q I will show you these two items here (showing same to witness). Can you identify these?

A (Looking at items) Yes, sir, both of those were laying on the ground just outside of the hole.

Q Are these the same two (referring to some hardware tools) that were identified by Mr. Arthur in your presence as having come out of his store?

A Yes, sir, they were.

Q Do you have any idea what that is?

A I don't know what it used for. I sure don't.

THE MON. GRADY RUFF: Judge, I would like to introduce all of this into evidence.

[30] THE COURT: Let them be so marked and filed.

OBJECTION BY HON. W. E. ROGERS, III: Judge, I don't believe a proper foundation has been laid for these particular things.

HON. GRADY RUFF: She said that is what she found in the alley, Your Honor.

HON. W. E. ROGERS, III: She didn't testify where they had been.

THE COURT: If the Court understands, there will be further evidence about them.

HON. GRADY RUFF: Yes, sir.

THE COURT: Then for the present I will OVERRULE THE OBJECTION, subject to further identification.

(JACKETS AND TOOLS FILED HEREWITH AND MARKED COMMONWEALTH'S EXHIBITS 1, 2, 3 AND 4).

Q Miss Ellison, did you examine the hole in the building that night?

A Yes, sir, I did.

Q At that time did you make any pictures?

A No, sir, the pictures were taken early that * * *.

* * * *

[34] * * * Your Honor, I would like for these to be passed around for the jury to look at.

THE COURT: All right, sir.

Q Miss Ellison, after you returned to the scene and you got these coats and the hardware what did you do then?

A Officer Davis brought the subject around for me to identify him.

Q Who did Officer Davis bring around?

A It was Lonnie Joe Carter.

Q Is Lonnie Joe Carter here?

A Yes, sir, he is.

Q Where is he?

A (Pointing to her right toward defense table) Right over there, sir.

Q Sitting next to Mr. Rogers?

A Yes, sir.

Q At that time were you able to identify Lonnie Joe Carter as the man you saw running away?

A Mr. Carter was wearing the same clothing, or appeared to be the same clothing, as the man I saw running had on.

Q And you saw, I believe you said, a tall thin man and a short chunky one?

[35] A Yes, sir.

Q How did you describe the clothing of the tall thin man?

A He had on a dark colored shirt and rust or orange color pants and he was carrying some items in his hands.

Q He was carrying some items in his hands?

A Yes, sir. In fact, one of them looked like a gym bag.

Q A gym bag?

A Or some type of a bag.

Q Could you tell what the other item in his hand was?

A No, sir, I couldn't.

Q Did the subject that you saw run off have on an outer garment or a coat of any kind?

A No, sir, he didn't.

Q Miss Ellison, do you remember what the weather conditions were that night?

A Yes, sir, it was rather cold. I couldn't tell you what the exact temperature was, but it was rather cold and a person would need to have a coat on that night.

Q This was December 22 of last year, right?

A Yes, sir.

[36] Q And you were able to state at that time and now that the clothes on Lonnie Joe Carter matched those or were similar in color, at least, as the ones that the man had on that ran off from the hole in the wall, is that correct?

A Yes, sir.

Q Did you ever have any conversation with Lonnie Joe Carter about this crime?

A No, sir, when we brought him down to the station he didn't want to say anything. There was another officer there who did say something about whose coats they were and Mr. Carter said that they were his coats.

OBJECTION BY HON. W. E. ROGERS, III: Judge, I object to the hearsay.

THE COURT: Yes, that is hearsay testimony and I believe you will have to get that from another party.

HON. GRADY RUFF: Well, Judge, I believe maybe we have misled her. Let me start over.

Q At the time you took Mr. Carter to the police station did you advise him of his rights and that he didn't have to make a statement and if [37] he wanted a lawyer?

A Yes, sir, I did.

Q At that time did he make a statement?

A No, sir, he did not and he would not waive a waiver certificate either.

Q And he refused and he did not want to make a statement?

A That's right, sir.

THE COURT: Just a minute, Mr. Ruff, let me ask a question.

HON. GRADY RUFF: All right.

THE COURT: Q Officer Ellison, at the time—when did you give him his Miranda rights?

A The moment we went back to the station.

Q That night?

A Yes, sir.

Q Did you give him his full Miranda rights?

A Yes, sir, we had the standard certificate and we read that to him.

Q And you gave him all of the elements of the Miranda Warning, did you?

A Yes, sir.

THE COURT: All right.

[38] DIRECT EXAMINATION (Cont'd).

QUESTIONS BY HON. GRADY RUFF:

Q Miss Ellison, do you have the form you filled out for his signature?

A Yes, sir.

Q (Referring to a document) Does this sheet here actually state you told him his rights were?

A (Looking at document) Yes, sir.

Q And did you then fill this out and present it to him for his signature?

A Yes, sir.

Q And he did not desire to sign that, is that correct?

A That's correct.

Q But you showed him what his rights were and he evidently understood them because he said that he did not want to make a statement, is that correct?

A Yes, sir.

HON. GRADY RUFF: Judge, I would like to introduce that as the standard Miranda Warning procedure.

THE COURT: Let it be so marked and received into evidence.

[39] (STATEMENT OF "YOUR RIGHTS" FILED HEREWITH AND MARKED AS COMMONWEALTH'S EXHIBIT 15).

Q Officer Ellison, after you had done this and he decided not to make a statement did Officer Colon, or rather Major Colon talk to him in your presence?

A Yes, sir, he did.

Q What did Major Colon ask him to do?

A He asked him if he was going to take the rap by himself.

Q Major Colon asked Lonnie Joe if he was going to take the full blame? In other words, the rap for this whole break-in by himself?

A Yes, sir.

Q And what did Lonnie Joe reply?

A He said: "Yeah, he was by himself."

Q And what did Colon say to him then?

A Colon asked him if both of those coats belonged to him and he said they did.

HON. GRADY RUFF: You may ask.

[40] CROSS EXAMINATION

QUESTIONS BY HON. W. E. ROGERS, III:

Q Officer Ellison, how long have you been on the police force?

A It has been about twenty (20) months.

Q Now, is that twenty (20) months until today?

A Yes, sir.

Q At the time of this incident this happened about four (4) months ago, is that right?

A Yes, sir.

Q So you had been on the force then for about sixteen (16) months?

A Yes, sir.

Q Was anybody else in the car with you on this night?

A No, sir, there was not.

Q Now you said that when you were coming down Sixth Street you happened to notice something in the alley. Do you remember what it was that attracted your attention?

A Well, o.k., that alley is usually completely empty. Usually, there is nothing in the pathway anyway and I looked down there and there was something there and I couldn't make out what it was.

[41] Q Did you have on your search light at that time?

A Not at that time, no, sir.

Q Where did your car stop in relation to the alley?

A I believe my door—my window had just passed the edge of the building and I glanced up and I went down—I couldn't understand what that was in the alleyway so I had to back up.

Q In other words, you had to back up in order to see down the alley?

A I had to back up to get a better look, yes, sir.

Q Is that when you turned on your flood light?

A Yes, sir, spotlight.

Q And where were these people that you saw?

A O.K., they were stooped down along the side of the building.

Q In what way were they stooped down?

A They looked like they were squatted down and when I hit the spotlight they both stood up.

Q Did they just stand up?

A They stood up. I think I surprised them as much as they surprised me. They stood up and looked straight at me and then they just took off running.

[42] Q This happened very quickly (snapping his fingers) like that?

A Yes, sir.

Q And they ran after they saw it was the police, is that right?

A I didn't hear you.

Q After they saw you were the police or after you turned the light on they ran, is that right?

A Yes, sir.

Q Now, you had to back your car up, didn't you, in order to make that turn into the alley there?

A I had already backed up when I went pass the first time and I had already backed up to see and then I hit the spotlight. I was backed up far enough to turn.

Q So you didn't have to back any further?

A No, sir.

Q Are you sure about that?

A Yes, sir, I am.

Q How wide is that alley?

A I really don't know for sure. I don't know offhand. I didn't measure it.

Q Well, would you say it is about 10 feet wide?

[43] A No, sir, it is wider than that.

Q It is a rather narrow alley, isn't it?

A It is one of the larger alleys that we have. It is probably the largest alley we have in town.

Q When you showed the picture to the jury, that shows a pick-up truck in that alley?

A Yes, sir.

Q I am going to show you a picture (this is Exhibit 13) and it shows a pick-up truck, and I presume that is the mouth of the alley, is that right (handing Exhibit 13 to witness)?

A (Looking at Exhibit 13) Yes, sir.

Q Now, in relation to this truck and this alleyway where was your car parked when you had on your search light?

A (Pointing to Exhibit 13) I had backed up to probably right here. It was about right here (pointing to same on Exhibit 13).

Q You are pointing to approximately where the tire is on the pick-up truck in the middle of the alley?

A Yes, sir.

Q Is that at the point where you were sitting in the car, about middleway there?

[44] A I couldn't tell you for sure. I am guessing to about where I had backed up to for everything was happening so quick I didn't. . . .

Q You are telling us you backed up enough so you could look down that alleyway?

A Yes, sir.

Q In your patrol car?

A Yes, sir.

Q And then were able to turn into this alley without backing up any more?

A I believe I was.

Q Do you believe or do you know whether or not you put it in reverse and. . .

A I may have maneuvered it around again. I really don't know for everything, like I said, happened so quick. I really wasn't thinking about how I was getting the car in there.

Q You noticed that the fellow ran away pretty quickly too, didn't you?

A Yes, sir.

Q So you had on your mind following them, didn't you?

A Yes, sir.

Q Did you ever consider getting out of the car and chasing them?

[45] A Yes, sir, I did.

Q But you decided not to do that, didn't you?

A I thought maybe if I could get the car through the alley and get on the other side of the buildings I at least could tell which direction they were headed. If I had gotten out on foot, one of them would have gone one way and the other one the other way.

Q Now, you described this other man to Mr. Ruff. Can you tell us what kind—what his features were; what he looked like?

A No, sir.

Q Did you ever attempt to work with the police artist in order to draw a picture of that man?

A No, sir, as I said, it was fairly dark in the alley and I didn't get a real close look of his face.

Q Do you remember what color pants he had on?

A Which one, sir?

Q The other man?

A Sir, they were dark colored.

Q Dark colored?

A Yes, sir.

Q Were they dark green?

A I couldn't tell. They were just a dark colored [46] pair of slacks.

Q And the other man had on light colored slacks?

A They were rust color; like an orange-brown.

Q You were able to tell the color of one of the man's pants but not of the other man's pants, is that right?

A Yes, sir.

Q Were you able to tell what the color of the shirt was that the other man had?

A Light and it looked like jersey. It might have been a light cream, blue or green.

Q Did he have a mustache?

A I couldn't tell you.

Q So you weren't able really to identify any of the features of either one of these men, is that right?

A No, sir, just their physical outline, height and width.

Q Did you radio these descriptions to Officer Davis when you picked up the microphone?

A I don't recall whether I actually told him a detailed description or not. I know I told him I had two subjects running—two black male subjects running toward Fourth through the alley. I don't recall if I gave him [47] clothing description or not.

Q Did you ever see either one of the subjects put his hand in this hole?

A No, sir.

Q Was the other man carrying anything?

A I didn't see anything.

Q When you went back to the scene—let me ask you this—how long was it—how long an interval of time was it between the time you went back to the wall and when you passed it?

A I would say maybe 2 minutes, approximately.

Q Two minutes?

A Approximately, yes, 2 or 3.

Q Didn't you follow either one of these subjects?

A The one subject, the short and heavier one, I lost sight of him the moment he hit the end of the alleyway.

Q Do you know which way he turned?

A He turned right going toward Virginia Street.

Q Now, these subjects were running away from you down the alley, is that right?

A Yes, sir.

Q From Fifth to Sixth?

A Yes, sir.

Q And you think one of them turned right?

[48] A Yes, sir.

Q Where did the other one go?

A I saw the tall thin one—there's a chain that runs across Mason-Pontiac—I saw him jump that and run through the Mason-Pontiac lot and I had to maneuver the car back out of the alley and go down Virginia Street. I was going to try to cut him off at Fourth and Virginia

Q So you turned right then out of the alley?

A Yes, sir.

Q You didn't see the other man then?

A No, sir, I did not.

Q And you think that he turned right also?

A Yes, sir.

Q Then where did you go?

A Well, I went down Fourth Street and I didn't see any sight of them so I turned back around and came up Virginia to go down Third and about the time I did that Officer Davis said he had one of them in custody.

Q Now you turned right on Fourth Street, is that right?

A No, I turned left on Fourth Street.

Q As if you were going to the Sheriff's office?

[49] A Yes, sir.

Q And then when you go to Main Street which way did you turn?

A I turned around and went back up Fourth Street.

Q You went back up Fourth to where?

A To Virginia.

Q Then where did you go?

A I started back up Virginia toward Third.

Q So you went up Virginia toward Third. Did you see Officer Davis and this subject?

A No, sir.

Q When did you get the radio call from Officer Davis that he had one of the subjects under arrest?

A It was right there while I was on Virginia Street headed toward Third, either before or after I got to Third. I really don't know for sure.

Q So then what did you do?

A When he said he had one of them in custody I drove straight back to the scene.

Q Were you on Virginia Street?

A I believe I was still on Virginia, yes. I don't believe I had made the turn into Third yet.

[50] Q Did you turn around and go back up Virginia?

A No, sir, I cut down Third then.

Q Down Third to Main?

A Yes, sir.

Q And then from Main back up to Sixth?

A Yes, sir.

Q And you say you did all of this in 2 or 3 minutes?

A Yes, sir.

Q Did you see the subject after he jumped this chain fence or whatever it was?

A I saw him running through the Mason-Pontiac lot there and when he hit the edge of the building I didn't see any more of him.

Q Did you see anybody else running?

A No, sir.

Q Was anybody else out on the streets?

A On Virginia Street up along the side of the bars there were people out there.

Q Did you ever go back up to these bars to check to see if you could find this other man?

A No, sir.

Q Can you describe to me and in a little bit better in detail what this other man looked like?

* * * *

[52] CROSS EXAMINATION (Cont'd).

QUESTIONS BY HON. W. E. ROGERS, III:

Q Miss Ellison, I think we were talking about the size of the other man and I was asking you if you could tell me how big he was. Could you tell me that in rela-

tion to Mr. Ruff, for instance? Was he as large as Mr. Ruff?

A He was probably about his height. He was a stocky man but he wasn't quite as stocky as Mr. Ruff.

Q Was he as stocky as Officer Davis?

A About that, yes, sir.

Q Now, you testified that the man, the other man that ran away did not have anything in his hands?

A I didn't say he didn't. I didn't see anything.

Q When you went back to the Young Hardware building did you make a thorough search of that area?

A Yes, sir.

Q Did you look behind the building?

A Yes, sir.

Q Did you look in the parking lot behind the building?

[53] A Yes, sir.

Q Did you look in the parking lot behind the buildings?

A I didn't myself. There were other officers searching in the area also. I didn't search the parking lot myself, no.

Q And the items that you have presented here today, are they the only items that you found?

A No, sir, there were some other items but Mr. Mack Arthur from Young Hardware, he took those up and stuck them back on the shelf before I got to them and I asked him what he did with them and he said that he put them back on the shelf.

Q Was he there when you got back to Young Hardware after . . .

A No, sir.

Q How long did it take him to get there?

A I really don't know. I don't know the time he got there.

Q Would it have been an hour possibly?

A No, it was less than that. I would say it was less than 30 minutes or 20 minutes.

Q Was Mr. Mack Arthur instructed not to touch these items?

[54] A O.K., we were afraid possibly there was someone in the building and when Mr. Mack Arthur got here he had unlocked the front door for us and we did a thorough search of the inside of the building first.

Q But you didn't answer my question. Do you know whether he had been instructed not to. . .

A I really don't know whether he had been or not.

Q When you left these items, you left them in the alleyway?

A Yes, sir, they were still laying in the alleyway.

Q You had not marked them for identification then?

A Not yet, no, sir.

Q Mr. Mack Arthur did not pick up these items then?

A No, sir, I had picked up some and I started putting them in the car—O.K., I began to do the search of the building, O.K. and it took a good 10 minutes, I would say, to do a good check of the building and I was standing outside of the front door at that time and there was another officer on the side of the building and where the hole and everything was and I don't remember who that was but then [55] after they said the building was clear I went back around the side and I picked up some items and put them in my cruiser.

Q Were these the items that you picked up and put in your cruiser (referring to Commonwealth's Exhibits 1, 2, 3 and 4)?

A (Looking at same) Yes, sir.

Q Do you know whether anybody else got any other items?

A No, sir, I don't.

Q In the search around Young Hardware and the surrounding grounds, did you ever find any tools with which a person could break into this building?

A No, sir.

Q You didn't find a crowbar?

A No, sir, we did not.

Q Do you know how long it had been since the police had checked Young Hardware before you had checked Young Hardware?

A I really don't know for sure. I know I had been in that area all night because of the bars, you know. We try to check the area every half hour and I couldn't tell you how long before I had been through there or another [56] officer had been.

Q Had you been down that alley previously that night?

A Not the alley, I had been down Sixth Street.

Q Do you remember flashing your light down the alley at that time?

A I don't recall.

Q How long was that before you discovered this break-in? How long, the previous time that you went by?

A I don't know. I have no idea.

Q Miss Ellison, do you ever wear glasses?

A No, sir.

Q Do you know whether or not there were any efforts made to fingerprint any of the items that were found outside of the Young Hardware?

A No, sir. We didn't try to take any fingerprints.

Q When you say these two men—I think you said earlier, that they didn't have their hands inside the building, is that right, when you saw them?

A You asked if I had seen them reaching inside the building. I hadn't seen it, no, sir.

Q Miss Ellison, when was the first time that you [57] saw Lonnie Carter this man here (referring to defendant seated at counsel table with his counsel) after you shined your light in the alley?

A Will you repeat that?

Q When was the first time—when did you see Lonnie Carter the first time?

A For the first time?

Q Yes, mam?

A Well, the man I saw in the alleyway fit Mr. Carter's description. Now, the first time I had seen Mr. Carter's face was when Officer Davis brought him back around to the scene.

Q Officer Davis brought him to Young Hardware?

A Yes, sir.

Q And you saw him there?

A Yes, sir.

Q And Officer Davis told you that this was the man that he had apprehended, is that right?

A Yes, sir.

Q Where was Lonnie Carter when he was brought over to Young Hardware? Was he in the squad car?

A Yes, sir.

Q Did he ever get out of the squad car?

[58] A Yes, sir, he did. In fact, Officer Beard did the transporting, transported Mr. Carter from Young Hardware to the station.

Q Did you see him get out of one car and into another?

A I believe I did, but I am not real positive.

Q At any rate, when you identified Lonnie Joe Carter you had been told this was the man that was stopped and brought over here?

A Yes, sir.

Q You didn't say "Yes, that's the man"?

A Sir?

Q When they brought him over there, did you say, "Yes, that's the man" ?

A I don't know if I said that or not. I looked at Mr. Carter and saw what he was wearing and what was the same description of the clothing subject had on when he was running.

Q Could you have picked Mr. Carter out of a line up?

A Only perhaps by height and weight and clothing for I never saw Mr. Carter's face when he was running.

HON. W. E. ROGERS, III: That's all.

[59] THE COURT: Any further questions, Mr. Ruff?
HON. GRADY RUFF: No, sir, Judge.

THERE BEING NO FURTHER QUESTIONS, THE WITNESS WAS DISMISSED AND WITHDREW.

LeROY DAVIS

Having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY HON. GRADY RUFF:

Q State you name to the jury, please.
A LeRoy Davis.
Q Officer Davis, are you on the police department?
A Yes, I am.
Q How long have you been on the City Police Department?
[60] A About four and a half (4½) years.
Q Were you on duty in the early morning hours of December 22, 1978?
A Yes, I was.
Q Do you recall any unusual occurrence around Young Hardware in the early morning hours?
A Yes, I got a—I was sitting at Fifth and Virginia and I heard Officer Ellison give out a call that there were two black males in the alley behind—beside Young Hardware and that they were running toward Fifth Street. And, like I said, I was sitting at Fifth and Virginia and I saw them when they came out and both subjects ran toward the parking lot of Mason-Pontiac and so I turned right and saw the direction they were running and by the time I got about middleways one of the subjects doved back and I kept going and at Fourth and Virginia I looked left and one of the subjects kept running on across Fourth Street. There is an alley behind Stamm's Motel and he was going to that alley so I went on up Virginia Street and I made a lefthand turn on Third for I knew

the subject had to come out of that alley on that end and by the time I got to the [61] alley he was coming out on Virginia Street and I made a lefthand turn on Third for I knew the subject had to come out of the alley on that end and by the time I got to the alley he was coming out and I almost hit him and I told the subject to stop. He wouldn't stop. He just kept running so I got out and gave chase and I stopped him on Third and Virginia, right in front of the church.

Q I have drawn a little map on this board and I want you to show this jury just what you did.

A (Pointing to drawing on blackboard) Well, this is the alley beside Young Hardware and the way Officer Ellison described it to me the subject was running in this direction (pointing out same on drawing). I was sitting right here where I could see down Fifth Street and both subjects ran through this parking lot right here (pointing to drawing on board) and by the time I got here in my police car one of the subjects came back in this direction. I pulled down to Fourth Street and then I looked left and a subject was coming across and by the time he got behind Stamm Motel he went through here, through the alley right here [62] and when I turned on Third Street coming this direction (pointing out same on drawing on blackboard)—the alley probably comes out right here and this is where I pulled my police car right here (again pointing to drawing) and he ran right beside it and I told him to stop and he would not so I got out and chased him and there is a small lawn right about here (again pointing to drawing) and he stepped up on it and he had two items in his hands and he dropped them and he went around the corner and he was going so fast, well, he stumbled when he stepped back up on the curb and I told him to halt and he stopped and that's when I placed him under arrest.

Q Now, you say—I want to pick up on your testimony there—that running through that alley there and then crossing Fifth you saw him cross Fifth and go into Mason's parking lot, is that right?

A Right.

Q And then you went on and saw him cross Fourth?

A Yes, sir.

Q You were driving parallel, I suppose, to his running, is that correct?

[63] A Right.

Q You looked up Fourth Street and saw him cross?

A Right.

Q Is there an alley there that goes behind Stamm's Motel?

A Yes, there is.

Q And it comes out on Third Street?

A Right.

Q And I believe you stated that you drove to Third and turned down Third and stopped there at that alley?

A Right.

Q And that's when you saw him again?

A He came out of that alley.

Q How close did he run to your car?

A If I had opened the door a little sooner he would have run dead into it.

Q It was that close?

A Right.

Q Now, did you get out of your car at this point?

A After he went past.

Q After he went past?

A I opened the door and started chasing him.

Q You got out of the car and chased him on foot?

A Yes, I did.

[64] Q And you had already yelled to him to halt?

A Yes, I did, because I already had the window rolled down.

Q And you say that he ran up through the small lawn at the church?

A Yes, sir.

Q And he dropped two objects up there?

A Yes, he did.

Q What did he drop?

A One of them was a bag and one of them was a radio.

Q Was there anything unusual about the radio?

A Well, when we got it down to the station it was set on the police band and it also had an earphone that you could stick in your ear.

Q Now with a radio set on a police band would he be able or would anyone be able to turn the radio on and hear communications between the police department and cars?

A Yes, it would be just like having a scanner; anywhere we went they would know it.

Q If the station had called you and said there's a break-in going on at Young Hardware the person with the radio could have heard it?

A Yes, they could.

[65] Q And it had an earphone attached to it to go to the ear?

A Yes, it did.

Q Now, who was it that dropped this stuff? Who was it?

A It was Lonnie Joe Carter.

Q Do you know Lonnie Joe Carter?

A Yes, I do.

Q Is he here in the courtroom?

A Yes, he is.

Q Where is Lonnie Joe Carter?

A (Pointing to defendant seated at counsel table with his counsel) He's sitting right there.

Q And he's the man that stopped at Third Street when you yelled the last time?

A Well, on Virginia Street.

Q On Virginia Street and Third?

A Yes, there in front of the church.

Q I would like to show you this item right here, Mr. Davis, and ask you if you can identify it (handing item to witness)?

A (Looking at item) This is one of the items that he dropped that he had in his hand.

Q This is one of the items that Lonnie Joe Carter dropped?

[66] A Yes, he did.

Q While you were in pursuit of him?

A Yes, sir.

Q At 2:00 a.m. on this morning?

A That's right.

Q I would like you to examine this and see if you can identify it (handing an object to witness).

A (Looking at object) Yes, this is the radio. This was out where you put the earphone.

Q (Pointing to radio) This opens here, does it?

A Yes, it does.

Q And is this the earphone you are referring to?

A (Looking at same) Yes, sir.

Q And this was set on police band?

A Yes, it was.

Q To pick up police calls, is that correct?

A Yes.

Q And this is the other item that Mr. Carter dropped in the church yard?

A Yes, it is.

HON. GRADY RUFF: I would like to introduce both of these into evidence, please.

THE COURT: [67] Let them be received into evidence and so marked.

(BAG AND RADIO FILED HEREWITH AS COMMONWEALTH'S EXHIBIT 16 and 17).

Q Do you recall whether or not Lonnie Joe Carter had on an outer coat that night when you arrested him?

A No, he didn't.

Q He did not have one on?

A No, he did not.

Q What did he have on?

A He had on a shirt and a pair of pants.

Q Did he have anything on his hands?

A No, I don't think so but I can't remember. I remember he had some gloves in his back pocket.

Q He had some gloves in his back pocket?

A Right.

Q Did you give Lonnie Joe Carter his rights under the Miranda Act or did someone do it?

A It was given to him at the station.

Q Did he make any statement at that time?

A No, he didn't. After we give him his rights we asked him some questions but he really wasn't doing too much talking.

Q Were you present when a conversation occurred [68] between. . .

OBJECTION BY HON. W. E. ROGERS, III: Judge, I object to him leading the witness.

THE COURT: I will OVERRULE THE OBJECTION. Go ahead.

Q Were you present when a conversation occurred between Major Colon and Lonnie Carter in regard to the ownership of those two jackets there in front of you?

A Yes, I was.

Q Do you recall what was said?

A Major Colon asked him did he want to take the whole crime on hisself and I had asked him myself who was the other guy that the other jacket belonged to and he said: "There was no other guy. Both of these jackets belonged to me."

Q Now you heard him say that yourself?

A Yes, sir.

Q He admitted that both—or stated rather that both jackets belonged to him?

A Right.

HON. GRADY RUFF: That's all. You may ask.

[69] CROSS EXAMINATION

QUESTIONS BY HON. W. E. ROGERS, III:

Q Officer Davis, do you remember where you were when you got the call from Officer Ellison?

A I was sitting right at the corner of Fifth and Virginia.

Q Do you remember why you were there? Were you rolling at the time?

A No, I was sitting there.

Q Were you parked along the side of the street or...

A No, sir, o.k., I was working the east side that night and I was down in that area, patrolling the downtown area and so I pulled up to the corner.

Q Was your car along the curb?

A In the traffic lane.

Q In the traffic lane?

A Right.

Q Why were you stopped?

A Because there is a stop sign there and I was observing the people that were standing over to my left in front of one of the clubs.

Q Now, wait a minute, you said there was a stop sign. Were you on Virginia Street or were you [70] on Fifth?

A I was on Fifth.

Q You were coming down Fifth?

A Right, towards Main.

Q You stopped then at that stop sign on Fifth Street?

A Fifth and Virginia, right.

Q And you were talking to some people that were at that club on the left?

A I wasn't talking to anyone, no, sir. I was looking at some people.

Q And when did you get the call from Officer Ellison?

A Well, see, when we are riding around in those cars we pay attention to anything that is going on and when we go out we can still hear over the radio and when she said there was two black males running down the alley behind Young Hardware I just looked straight towards that alley and I seen them come out.

Q You saw two men coming out, is that right?

A Right.

Q And what—were you able to tell what both men were wearing?

A Well, they was running pretty fast. I noticed [71] the short subject and he had on either a gray or white sweat shirt and it had cut off sleeves on it because the taller subject was in front of him. He was in the lead when they was running and when they was running between the cars I cou. ln't see too much but I could see where they was going and the other subject doved back when I pulled out and was headed in the same direction they was running.

Q The other man, you say, doubled back toward the bars on Virginia Street, right?

A Right.

Q And you continued on and followed the other suspect, is that right?

A Right.

Q Did you ever lose sight of that suspect?

A Well, between in the direction he was running in that parking lot he would have to pass Mason-Pontiac office and that building was in between me and him and that was the only time I lost sight of him to the time he went down that alley.

Q You didn't lose sight of him when he was running between cars in the Mason-Pontiac lot?

A Well, trying to watch him and where I was [72] going too as fast as he was running he couldn't have slowed down at no time.

Q Now, did you get that radio running (referring to Commonwealth's Exhibit 16)? Does it work?

A When we got to the station I think Major Colon found it was set on the police band and we got it as evidence and we were filling out paper work also.

Q Does that radio have batteries in it?

A Yes, it has.

Q Will that radio play now?

A I couldn't tell you. It also has an electric plug on it and probably if it was plugged in it would work but

it has been handled quite a bit since all of this has been going on.

Q Well, do you think you know how to work the radio?

A I guess so.

Q Would you see if you could get it to work, please, sir, (handing same to witness)?

A (Taking radio and trying to operate same) It doesn't seem to be working now.

Q Did you try it out on the night of this incident?

A No, I didn't.

[73] Q Do you know whether or not anybody did try?

A I think Major Colon did.

Q You mentioned that you saw some gloves in Lonnie Joe Carter's back pocket, did you take those gloves from him?

A No, I didn't.

Q Can you describe the gloves?

A I think they were black gloves. Like I told you, there was lots of people going from office to office plus I had to go back to the scene to help gather evidence.

Q Are you sure he had gloves in his back pocket?

A As far as I know, he did.

Q As far as you know. Are you sure?

A I couldn't be positive.

Q If he had had gloves in his back pocket and you knew he was a suspected burglar would you have taken those gloves from him as evidence?

A Like I said, when we got down to the station I brought the radio in and also that bag and the other things he had on his person I think was taken by someone else.

Q Well, do you know if anybody else has got any gloves that belonged to Lonnie Carter?

A The gloves that was found on him they was sent [74] to the lab to get dust sample along with some dust sample from the hole knocked in the wall.

Q Where are those gloves now?

A They are still at the lab for they are months behind all over the State of Kentucky. They are behind and we haven't heard anything from them.

Q Does the prosecutor know about this?

A Yes, he does.

Q Now, you say that when you went to the police station that you or somebody read Mr. Carter his Miranda Rights, is that right?

A Yes, sir.

Q And you said that he said to Mr. Colon those coats—both of those coats belong to me?

A Yes, he did.

Q Did you believe that?

A No, I didn't believe it.

Q Are you sure he may have said or could have said that neither of those coats belong to me?

A No, sir, he did not say that because when I asked him who does this other coat belong to he said: "It didn't belong to anyone. It belongs to me—both of them belong to me"—and he said there was no other guy. [75] Q Well, did he tell you that he had broken into Young Hardware?

A No, he didn't. When we asked him about the coats right here (pointing to jackets in front of witness stand), shortly after that he would not say anything else.

Q Are you sure he didn't say: "I don't know anything about another guy?"

A All he said to me was that there was no other guy.

Q Can you describe to me what this other guy looked like?

A Well, he appeared to me to be about 5'9" or 5'8", stocky built and a little bit heavier than me. He was dark skinned, I know that.

Q Did you ever go back up to the bars on Virginia Street looking for this other man?

A No, I didn't because I am quite sure from experience that he wouldn't have stayed down there once the police got out of his eye sight.

Q Did you ask anybody around the bar if they had seen somebody running back up that way?

A It wouldn't do any good.

Q Why not?

A Because they wouldn't tell you.

[76] Q So you didn't make any further search for the other man?

A No, sir, and, like I said, I was gathering evidence and filling out a lot of paper work.

Q Do you know what other items that were outside that store in the alley besides these items that have been admitted into evidence, this strap and box? Were there other things out in the alley?

A As far as I know they are some of the things that were taken off that shelf outside that hole.

Q Do you know whether any of these items have been sent off to the lab for testing?

A No, I don't. We have a list but I don't think any of those items are on there. We only sent dirt samples and clothing and gloves.

HON. W. E. ROGERS, III: That's all.

HON. GRADY RUFF: Judge, I have a few more questions.

[77] RE-DIRECT EXAMINATION

QUESTIONS BY HON. GRADY RUFF:

Q Officer Davis, how long has that radio over there been down at the police station?

A Ever since the night it happened.

Q Some five or six months ago?

A Right.

Q You say you don't remember—that you didn't try the radio but you think somebody else did and that it worked?

A Yes, sir.

Q Is is possible that the batteries have run down in six months time?

A Could be and it has been setting up in a dry place.

HON. GRADY RUFF: That's all.

THERE BEING NO FURTHER QUESTIONS, THE WITNESS WAS DISMISSED AND WITHDREW.

HON. W. E. ROGERS, III: Judge, may I approach the bench?

THE COURT: Yes, sir.

* * * *

[86] RUSTY COLON

Having been first duly sworn, testified as follow:

DIRECT EXAMINATION

QUESTIONS BY HON. GRADY RUFF:

Q State your name to the jury, please.

A Rusty A. Colon.

Q Where do you work, Mr. Colon?

A Hopkinsville Police Department.

Q How long have you been there?

A Eleven years.

Q What is your present rank?

A Shift Commander, Major.

Q Were you on duty on the night of December 22, 1978?

A Yes, sir.

Q And were you involved in any way with the investigation of the break-in at Young Hardware?

A Yes, sir.

Q Major Colon, I want to ask you: Did you have any conversation that night with Lonnie Joe Carter?

A Yes, sir.

Q You know Mr. Carter, do you not?

[87] A Yes, sir.

Q Is that him seated there (indicating defendant seated at counsel table with his counsel)?

A Yes, sir.

Q Do you remember what it was about?

A Yes, sir, it was basically about a crime that had been committed at Young Hardware.

Q Do you recall how the conversation went; what you might have said to him? I am especially interested in any conversation, if you had any, concerning those two jackets there (indicating Commonwealth's Exhibits 3 and 4).

A They—by "they," the other officers had already brought Mr. Carter to the police department and they were in the investigator's office in the back part of the building and I had gone in and they were talking with him at the time and there was a second individual that had managed to escape, that was close to the scene at the time that they thought was involved in it and they were never able to apprehend him as he fled off and they had these two jackets and when I talked to Mr. Carter for a few minutes in reference to the crime I asked him if he intended to go it all by himself and [88] take the rap alone or if he wanted to implicate the other individual and he said that there was none other than himself and I made reference to both of these jackets and he said that both of the jackets were his.

Q That they both belonged to him?

A Yes, sir.

Q Now, the other area I want to talk to you about is a radio. Did you see a radio, a portable radio that night at the investigation or down at the office anywhere?

A Yes, sir.

Q Did you examine the radio at the time?

A Yes, sir, I looked at it and it was a multiband radio.

Q Did you pay any attention as to what band it might be set on?

A It was set on police frequency and it appeared to be on our frequency and I attempted to get the radio into operation and I couldn't get it to operate at all and one of the other officers took the radio and fiddled with the batteries and it finally did come on.

Q Was it connected up to your police radio?

A Yes, sir, it was set to our primary frequency.

[89] Q And it would pick up calls from your station to the cars, is that correct?

A Yes, sir.

HON. GRADY RUFF: I have no further questions.

CROSS EXAMINATION

QUESTIONS BY HON. W. E. ROGERS, III:

Q Officer Colon, did you go to the Young Hardware Store that night?

A Yes, sir, I did.

Q Did you assist in picking up the items that were out in the alley?

A No, sir, I don't believe I secured any of the items that were out there.

Q As Major, that means that you are in charge of the whole operation during the time when you are on, is that right?

A I am in charge of the patrol section, yes, sir.

Q Are you also in charge in investigation?

A No, sir.

[90] Q Were there investigators at Young Hardware?

A I don't recall whether there were any investigators on the scene at the time I was there or not. I really couldn't advise on that.

Q Do you know whether any investigators ever went to Young Hardware?

A No, sir, I don't.

Q You don't know whether they did?

A I couldn't positively say for sure.

Q I want to show you these items that have been placed in evidence. This is a strap and this is a box of hinge straps (referring to Commonwealth Exhibits 1 and 2). Were there other items out in the alley when you got there?

A Yes, sir, there very well could have been for there were bricks and debris and things they had removed from the wall and the hinge straps, it seems like there was more than one box of them that were removed from the building. I don't recall if there was anything else outside of the building or not. We looked for some type of a tool and I don't recall ever finding one where the blocks were removed—used to remove the blocks with.

Q Do you know whether or not your men or the [91] investigators took any fingerprints of any of these items?

A If there were any fingerprints removed it would have been done by the investigators.

Q Did you take Mr. Carter down to the station with you?

A No, sir.

Q You were there when he was brought in or did you come in later?

A He had already been removed from the scene when I—I believe he had already been removed when I first seen him. He was already in the police department.

Q Was he under interrogation when you came in?

A When I first seen him I don't think anybody was talking to him. There was another officer in the room with him but I don't believe he was being interrogated.

Q Well, did you read him his Miranda Rights or. . .

A His rights had already been given him by the officer. He had been warned of his rights under the Miranda.

Q So he had been questioned before you got there?

A I presume he could have been but I don't know.

[92] Q Do you remember anything being said about a cigarette?

A About what?

Q About a cigarette—do you remember any conversation about a cigarette?

A No, sir.

Q Was there a package of Salem in that bag there that is on the floor?

A I don't recall.

Q You don't recall a conversation about cigarettes then?

A No, sir, I do not.

Q Now when Lonnie told you that both of those coats belonged to him did you believe him?

A I really couldn't say whether they were both his or not. I presume if he wanted them both to be his they could have been.

Q Did you ask him to try them on?

A No, sir.

Q Did you get that statement in writing?

A I didn't.

Q Did any of the other officers get that statement in writing?

A The investigators may have. I really don't know.

[93] Q You didn't get any type of written statement from Mr. Carter, did you?

A No, sir, I did not.

Q Did you ask him—when he told you that both of those coats are mine—did you ask him to put that in writing?

A I don't recall asking him to put it in writing.

Q Didn't you think it was important enough to be put in writing?

A No, sir, apparently not or I would have asked for it. As I recall, there was myself and two and possibly three other officers in there then.

Q Are you saying that this was more or less a meaningless statement that he made to you?

A It was to me, yes, sir.

HON. W. E. ROGERS, III: I have no further questions.

THERE BEING NO FURTHER QUESTIONS, THE WITNESS WAS DISMISSED AND WITHDREW.

HON. GRADY RUFF: Your Honor, that's the Commonwealth's case.

THE COURT: Ladies and Gentlemen, we have been here for [94] a while so let's have about a 10 minute break and I would like to see counsel and the court reporter back in my office but Ladies and Gentlemen before we take the break I want to remind you again not to discuss this case with anyone or among yourselves at this time or allow anyone to contact you regarding this case. Reserve your judgment in this case until you have heard all of the evidence, the Court's instructions, argument of counsel and the case is finally submitted to you.

With that admonition we will take about a 10 minute recess.

HEARING IN CHAMBERS

THE COURT: Mrs. Scruggs, let the record show that we are now in the Court's chambers with counsel for both sides, defendant and court reporter. All right, gentlemen.

HON. W. E. ROGERS, III: Judge, I would like to make a motion for a directed verdict and also I would like to renew my motion for a mistrial on the basis [95] of the Commonwealth's failure to respond to the motion for Bill of Particulars.

THE COURT: The Court has already passed on the question concerning the Bill of Particulars. I don't look upon that as prejudicial to the defendant's rights under Criminal Rules 9.24 and 9.26 which deal with two subjects, harmless error and substantial error. I simply

cannot see where his substantial rights have been affected even if you should have been furnished the information that you have mentioned, about the gloves, I believe?

HON. W. E. ROGERS, III: Yes, sir.

THE COURT: So on the basis of those two rules I OVERRULE THAT MOTION.

As to the motion for a directed verdict, true enough the evidence in this case is circumstantial but I think they have made out enough case to take the case to the jury under the most recent case that I know of, Houston vs Commonwealth, 554 SW 2d, page 89. And, in substance, the Court there held that the test [96] of whether or not evidence is circumstantial is not whether the evidence is consistent with innocence as it is with guilt, that used to be the rule, but the present rule is if the evidence is such that the Trial Judge can conclude that reasonable minds might fairly find the defendant guilty beyond a reasonable doubt it is sufficient though circumstantial. I suppose that is another way of saying the same thing but in any event I will have to deny the motion for a directed verdict.

Now, Mr. Rogers, assuming that is the only motion you have at the present. . .

HON. W. E. ROGERS, III: Yes, sir.

THE COURT: We must now approach the question and if you want a minute or two to talk to your client as to whether he is going to elect to take the stand, you can do so, or if you have made that decision, we will go on to the question of the impeachment because understand that the Commonwealth has some cases it wants to submit to the Court under the Cotton case.

HON. W. E. ROGERS, III: [97] Judge, I think possibly the only reservation Mr. Carter might have about testifying would be his impeachment by the use of these previous offenses that he is aware of and has told me about. I would like to explain to him in front of you what this all means.

THE COURT: All right.

HON. W. E. ROGERS, III: Lonnie. . .

THE COURT: Now, Lonnie, I want you to fully understand what we are talking about.

HON. W. E. ROGERS, III: Lonnie, if you take the stand and, of course, you will be under oath and you will swear to tell the truth, but the Commonwealth can use the fact that you have several offenses on your record that involve theft and impeach—you know what I mean by "impeach"?

LONNIE JOE CARTER: Nodded that he did.

HON. W. E. ROGERS, III: They can impeach your capacity or your propensity to tell the truth and this, I might tell you, in my experience, is a heavy thing; it is [98] very serious, and I think juries take it very seriously and your propensity to tell the truth is weighed down I think quite heavily by the jury. I think, Judge, there are one or two storehouse breaking charges, one is third degree burglary and another theft of over $100. on his record.

THE COURT: Well, the two that are alleged in the second stage, should they find him guilty, the storehouse breaking in 1973, and the knowingly receiving of property of over $100.

THE COURT TO HON. GRADY RUFF: Are those the two?

HON. GRADY RUFF: Yes, sir. That's two of the ones that I want to bring out.

THE COURT: I am not going to let you just sift through his entire record.

HON. GRADY RUFF: Judge, I think that. . .

THE COURT: The Court can limit that.

HON. GRADY RUFF: [99] In this case I don't think you should because there's a steady stream of them.

THE COURT: Well, you know what the Cotton case says as well as I do. The Court has discretionary control in several respects and, of course, one of them is

the age of the conviction, how remote it is, and naturally, it must involve dishonesty and the Court has control over the number of other convictions that I can allow you to introduce for you to get to the point—if the man has a dozen that would be taking it to the extreme and I simply wouldn't allow you to introduce a dozen charges.

HON. GRADY RUFF: Judge, I don't have a dozen. I don't have but eleven.

HON. W. E. ROGERS, III: Judge, I agree with you on that point.

HON. GRADY RUFF: Of course you would because they would tend to be inflammatory.

THE COURT: Really, of course, the choice is yours which ones you use.

[100] HON. GRADY RUFF: Well, we have some extremely recent ones. Lonnie Joe, you wrote to me from the federal penitentiary at some time. What were you in there for?

LONNIE JOE CARTER—DEFENDANT: I have never been in the federal penitentiary.

HON. GRADY RUFF: What place was that you were in up argound. . .

LONNIE JOE CARTER: Henderson.

HON. GRADY RUFF: No, I thought you were up in West Virginia.

LONNIE JOE CARTER: No, I never been in federal penitentiary.

THE COURT: You have never had a federal offense?

LONNIE JOE CARTER: I had a federal offense but never was in West Virginia.

HON. GRADY RUFF: Where did you do the time?

LONNIE JOE CARTER: Up at Henderson, Kentucky, Green Hill Comprehensive Center.

[101] HON. GRADY RUFF: When was that?

LONNIE JOE CARTER: Just last year.

THE COURT: That's not a penitentiary?

LONNIE JOE CARTER: What it was I was paroled and they let me out down at Eddyville and the fed

failed to pick me up at that time and I was on the street about three weeks and they exercised the detainer and I had about four months to do and they sent me up to Henderson.

THE COURT: That would have to be off your list. That was a detainer. So that leaves you ten.

HON. GRADY RUFF: And they are all good ones too, Judge. I don't know how many he has got.

THE COURT: What are they? You mean qualified under the Cotton case?

HON. GRADY RUFF: Yes, sir, eight storehouse breakings, one grand larceny, one operating a motor vehicle without [102] the owner's consent and knowingly receiving stolen property.

HON. W. E. ROGERS, III: Those storehouse breakings go back to the early 60's.

HON. GRADY RUFF: They go back to the time he was eighteen (18) and about a week after he became eighteen (18) he started showing up in the big court.

THE COURT: I think anything about that early I rule out of the ground of remoteness.

Grady, I don't think it is safe for I think you are inviting a reversal on the inflammatory ground if you get above three and I think three would be the limit that I would let you go and I would suggest that you pick out the most recent ones and if you could avoid the two that are involved in the second stage you would probably be better off.

HON. GRADY RUFF: I can't do that for those are the two most recent one so that's the way it has to be.

THE COURT: Well, there's no rule that I know of that [103] prohibits using those. It seems a little bit strange that they split the trial and made two stages of it with two aggravating or enhancing convictions or whatever you want to call them.

HON. GRADY RUFF: Well, it wouldn't necessarily always be that way. In fact, he could have two that

weren't even of the Cotton variety so we couldn't even bring them up.

THE COURT: That's true. Now, before we get into the matter we need to have an indication from Lonnie and his lawyer and if you all want to go out and talk about it you can do it, of whether or not he wants to testify. Lonnie, do you understand what we are saying? You have got a choice of not testifying and he cannot mention that fact. He cannot argue the fact that you didn't testify. He can't argue that to the jury. You can sit there and say nothing and it cannot be mentioned if you don't testify but if you do these other convictions can be shown to indicate to the jury that maybe you are not telling the truth.

LONNIE JOE CARTER: [104] Are you saying the most recent convictions?

THE COURT: Well, they are the ones he plans to use. Now, do you understand what you are charged with?

LONNIE JOE CARTER: Yes, sir.

THE COURT: All right, you talk to Mr. Rogers and then tell us what you want to do.

WHEREUPON, at this time Mr. Rogers and the defendant left the Court's chambers and had a discussion as to whether or not the defendant would testify, after which the defendant and his lawyer returned to the Court's chambers.

THE COURT: Now, Lonnie, you have come back after a private conference with your lawyer, Mr. Rogers and you have told me you have decided not to take the stand?

LONNIE JOE CARTER: Yes, sir.

THE COURT: Mr. Ruff knows this and he knows that he [105] cannot comment upon it in his closing argument so we avoid the necessity of getting into the Cotton case question. .

HON. W. E. ROGERS, III: Judge, I would like to add into the record that the advice of counsel to Mr. Carter was that in plain terms he was between a rock and a hard place and that if he testified that his prior

convictions could be used to impeach his testimony and if he didn't testify the jury whether Mr. Ruff comments on it or not would probably use that against him. And the decision not to testify was made by Mr. Carter himself.

THE COURT: Excuse me, did you say you advised him to testify.

HON. W. E. ROGERS, III No, I didn't. I told him that it was a double edged sword and that if he testified that the previous offenses would be used against him and that if he did not testify that the jury, in my experience, would use that against him by him not testifying and so it had to be his decision. It couldn't be mine.

[106] THE COURT: Do you fully understand that, Lonnie?

LONNIE JOE CARTER: Yes, sir.

THE COURT: Now, if you have bad luck and get convicted I don't want you to get up there and say that you weren't told all of this. It is on the record.

LONNIE JOE CARTER: Yes, sir.

THE COURT TO HON. W. E. ROGERS, III: Do you have any evidence for the defense?

HON. W. E. ROGERS, III: No, sir.

HON. DAN KEMP: Then we can now discuss the instructions.

HON. W. E. ROGERS, III: I make an oral request for an instruction on trespassing.

THE COURT: Well, . . .

HON. W. E. ROGERS, III: I think this case from the proof that has been presented lends itself more to a charge of [107] trespassing than to a burglary charge.

THE COURT: No, Petey, I can't agree with that. It is either a case of being guilty of the charge or innocent of it. If he were to take the stand from what has been said—of course, I can't base my ruling on this, but should he testify I understand that Lonnie Joe would simply deny that he was anywhere around or had anything to do with it. From what I—he has not said that to me but

from what I hear that is his attitude and in face of that, that is a plain denial and alibi, or whatever you want to call it, and I don't see—there's no proof to instruct trespass on. Now, had he been drunk, for instance, and said so and got in there and didn't know where he was or something of that kind you have got trespass but in the absence of something like that I think he either had to stand or fall on the charge.

But you have got that in the record.

HON. W. E. ROGERS, III: Thank you, Judge.

WHEREUPON, instructions having been prepared the Court, counsel for both sides, defendant, Lonnie Joe [108] Carter, and the reporter returned into open court and at this time Hon. W. E. Rogers, III advised the Court that there would be no testimony introduced for and on behalf of the defense.

THE COURT: Ladies and Gentlemen, the case now having been completed I will now read you the Court's instructions which is the law in this case which will govern you when you go to the jury room to decide it. Whereupon, having read his instructions the Court advised counsel for defense that he might make his closing argument.

CLOSING ARGUMENT TO THE JURY

BY HON. W. E. ROGERS, III:

Ladies and Gentlemen of the jury, I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify? Let me tell you. The Judge just read to you that the man is presumed innocent and that it is up to the prosecution to prove him guilty beyond a reasonable doubt. He doesn't have to take the stand in his own behalf. He doesn't have to do [109] anything. We believe that this case just hasn't been proven. This is a case of breaking into Young Hardware and called third degree burglary under

our law and it requires that you go into the building with the intent to rob or to commit some other crime. The prosecution has to prove not only that this is done, but that this man (indicating the defendant seated at defense table) did it. Now, God only knows that they proved that this place was broken into. We will certainly admit that. But they have not proved beyond a reasonable doubt that this man (again indicating defendant) did it.

Let's look at their testimony in that regard. Let's look at Officer Ellison's testimony. She was the lady officer. Her testimony was used to identify the subject. In your mind, did she identify Mr. Carter? She said that in a flash—it was pitch dark, 2:00 o'clock in the morning; there were no lights in this alley and she turns on her spotlight and in maneuvering her car around she couldn't even remember whether she backed it up or not but you go over there and look and I will guarantee you that from where she was sitting she had to back that car up—either that or she's a plastic man. In that flash, in that instant, she turned that spotlight on and she looked down there and she saw some figures yes; she saw some figures. I don't doubt her there. I don't doubt her testimony in any respect but I [110] do doubt what she saw. She said she saw one man who had on brownish color pants and another man that was tall and slim and another man that was short and chunky. She didn't know what color pants he had on but they were dark. She evidently radioed the description to the other officer. She merely saw two images in the dark as if you were to take a strong flashlight and shine it down a dark alley. You could see two images and in all of the confusion remember what they had on and remember what they looked like? Now, she didn't remember that. She saw this man (again indicating defendant) at the police station or later when he was brought up to the scene of the crime. Then she saw him. And she said: "Yeah, that's the man", and that's when she knew what color pants he had on. I will

bet you if she had been asked before he came up there what color pants did that man have on she wouldn't have had any dreaming idea.

Now, the prosecution has got to show that this (again indicating and pointing to defendant) is their man. They have got to show that this is the man that broke into that place. They have shown this is the man that was running—this was the man that was running down the street and he saw the police—it was 2:00 o'clock at night—and he took off running. Now, that in itself is an inference but it does not mean that he is the man that broke into this place. And that's all they have. They have him running down [111] the street with a bag in his hand and with a radio in his hand, neither of which were identified as having been at the scene. This lady said that she saw a man running with a bag. Well, what does that mean? It didn't have any burglary tools in it. Running down the street with a radio; so it is on a police band or hooked up listening to the police, what does that mean? That doesn't mean anything more than running down the street with a bag in his hand. That doesn't mean that he broke into Young Hardware. He may have been just walking down that alley. He could have been just walking down that alley with a bag in his hand and the police come up and he takes off running. That's all they have proved. If you want to send this man to prison for that then, you know, think about it, because one of these days you may have a child or it might be you that is going to prison if you happen to be somewhere at the wrong time.

Now, I want to tell you something. The police and the prosecution and the state are not helpless. Now, this man (again pointing to defendant) is helpless. He has been in jail five (5) months while they have had the laboratories and the investigators and that's good; I am glad that we have that. We pay for it with our tax money and I am glad that we have got it but five (5) months, they say, to get back from the lab some gloves and to test the dust on them, where is that testimony? Where is

that? The [112] officer said it was up in Frankfort. He said that the prosecutor knew about it. The prosecutor could have asked for a continuance in this case. I am not the one that was begging to try this case today. The prosecutor could have asked for the evidence to come down to prove that was the same dust. Where is it? They have got these labs. They have got to use them. You have to make them use them. And if you don't make them use them, then they just bring people in here and railroad them. Where are the fingerprints? They picked up things here (indicating hinges, etc. and picking one up) that would carry fingerprints. I don't know much about fingerprints. I have seen television like you all have. I have seen them go around and dust things to pick up fingerprints, but they didn't even try. They just knew they had a guy running and when a guy runs he is guilty, right? Even though he is over there near black town and even though the officer himself is scared to go over there and says that if he goes over there nobody is going to say anything to him or tell him about anything; everybody over there is scared to death at 2:00 o'clock in the morning of the police. I bet you those police could have looked at anybody over there on that street cross-eyed and they would start running and they they go pick them up for doing whatever they wanted to say that they were doing and then bring them into court and not prove it and put them [113] in the penitentiary—put them away—isolate them on nothing.

I know that Mr. Ruff is going to make a big point of this running and I want you to remember what he could have proved.

You know I don't know what happened out there that night. Lonnie Carter says that he is innocent. That is what he says when he says that I am not guilty and he doesn't have to get on that stand to say it. "I didn't do it", he says, by saying that he is not guilty. We haven't said that Mack Arthur didn't get broken into. Mack Arthur got broken into but somebody else did it and there was time for somebody else to have done it.

It must have taken quite a long time to break through three layers of brick. There could have been almost innumerable numbers of people that could have done this and the police want to hang somebody that was running.

Ladies and Gentlemen, I ask you to remember that our obligation as citizens and as jurors—this is a very special spot that you are sitting in here today—this is where justice really comes out and I really thank goodness for our system that says we are not guilty until we are proven guilty and you remember that a man is not proven guilty by a great oratory and I am the first that will sit there being spellbound by Mr. Ruff. Don't hold it against [114] Lonnie Joe Carter, because Grady Ruff can talk better than I can. Don't hold that against him. And remember that it was the prosecutor's job to prove this man guilty beyond a reasonable doubt and that he is innocent until that is done.

Thank you.

THE COURT: All right, Mr. Ruff.

CLOSING ARGUMENT TO THE JURY

BY HON. GRADY RUFF:

HON. GRADY RUFF: May it please the Court.

THE COURT: Mr. Ruff.

HON. GRADY RUFF: Mr. Rogers.

Ladies and Gentlemen, I want to briefly go over the evidence that we were privileged to hear in here today and I would say, as Mr. Rogers has said before, [115] consider the whole case. Consider only what you have heard up here as evidence in this case and not something that you might speculate happened or could have happened or what. Base your judgment on the evidence. That is where your judgment and decision could come from is the evidence.

Now, I hope everyone understands this little sketch here (referring to drawing on blackboard). (Pointing to

sketch) Actually, this is as if you were standing in front of Young Hardware which is right down the street here, as you know. (Pointing to sketch) This is Young Hardware; this being Main Street out here and this is Virginia and right next to this, this little building here would be Edna's Used Furniture. Now Officer Ellison testified that just before 2:00 a.m. on a very cold night in December that she turned off of Main and came down Sixth Street and as she passed this alley she noticed that something was in there that usually was not. She testified that she stopped and backed up and threw her light into the alley and that she threw it right on two black males who were squatted down in the alley. She told you that they immediately stood up and ran. They turned and ran down this alley. Now when you come out of this alley, as she told you, there's a way that you can cut back over this way, and then this is an opened area and she says that she went down the alley in her car and saw one of them, the tall thin one with the orange color pants on [116] cross Fifth Street here and jumped a chain that Mason-Pontiac has right here along Fifth Street along the sidewalk, if any of you are familiar with it. She said that when she turned down here she immediately called for LeRoy Davis to help her, to come, and what had happened, that there were males running, two black males running, and Mr. Davis, as good fortune for the citizens would have it, was sitting right here. He testified that he was on Fifth Street headed in this direction (again pointing to sketch on blackboard) when he saw them run across here. He told you that he turned and drove parallel with the way that they were running. That one of the subjects, as they call them, the short chunky one, turned and came back—in fact, that is Mr. Davis' mark (pointing to sketch) that he headed back in this direction and that the tall thin one ran on toward Fourth. Now, remember this is a very short distance. It is not any distance, a very short block here, and Mr. Davis is in an automobile

driving parallel to it. When he pulls down here to Fourth he sees the same man run across Fourth Street into an alley that runs between buildings here (pointing out same on sketch). There's a fish market or something here and then maybe a lumber yard and then over on this —there's a car lot and possibly a motel or something, but anyway there's an alley that runs completely through there and Mr. Davis testified that he saw the man. He first saw him run [117] out of here (again pointing to sketch) and across here and up that alley. He saw him enter that alley. He told you that he drove up here and went to that alley and got there just in time to see this man (pointing to defendant) run out of there. And he told you that he yelled at this man to stop and he did not. He told you that the man turned and ran across this church lot there—there's a small grassy lot—at which time this man (again pointing to defendant), Lonnie Joe Carter threw this bag (picking up Commonwealth's exhibit, the bag) and this radio (picking up Commonwealth's exhibit, the radio) down. He threw them down in this lot and continued to run. Now Davis bailed out of his car and chased him on foot and he told you that when Lonnie Joe turned this corner that he nearly fell down and he yelled at him again and that he stopped and he put him under arrest. Now, that's a portion of three or four blocks there—well, actually, one, two, and a portion of this one (pointing to sketch on blackboard) and it took only seconds. They say two minutes and I would guess that a man running could do that in one minute. And they further testified that when they brought them back Miss Ellison, Policeman Ellison, said that the clothes matched the ones that one of the men, the tall thin one had on. And she further testified to you here, she described his build and told you the race he was; that he was thin and tall and she described his clothing and [118] he looked like he had some sort of bag in his hand. Now, that is the Commonwealth's case, in effect, that someone knocked a hole

in this wall here at Young Hardware at 2:00 a.m. in the morning and pulled items out, and you have seen some of them they picked up, and left them in that alley and Mr. Arthur has testified that he did not give anybody permission to do that; that he didn't want anybody knocking a hole in his building.

Now, within a minute, possibly, this man is caught right here (pointing to sketch). He is seen running from that hole, not just near the hole, not in the area, not on the street adjacent to it, but kneeling down—squatting down by that hole, the very hole that has been knocked into Mr. Arthur's business. He immediately jumps up and runs and is watched and Miss Ellison told you she saw him cross Fifth and jump the chain. And here at the same time is LeRoy Davis. He sees him cross Fifth. LeRoy turns and follows him. Now he lost sight of him, true, behind Mason-Pontiac but lo and behold when he gets here (pointing to sketch) there he runs again. He goes on up here and turns down the alley and here's this man (pointing to defendant), this fellow running out the same end of the alley and he is carrying a bag and a radio and the radio by a strange coincidence was one that would pick up police calls and, further, has an ear plug in it. Do you know what an ear plug does to a [119] radio? It keeps it from playing loud. You can't hear one except through the plug. Now that is a commonly used burglar's tool. They have it set on the police frequency and if someone in the neighborhood were to call the police department and say: "Listen, I think I hear someone knocking a hole in Young Hardware" and the police department put it out on the radio would car so and so go by Young Hardware by the time they got there this fellow would have been gone because he is listening in to the same frequency. He hears it just as well as the car and it is a commonly used burglar's tool.

Now, what other proof did we have? Mr. Colon, Major Colon says that he is the one that noticed it was on the

police band and Major Colon said that someone down there got it to work that night and that it was working at that time. Of course, it does not work now. It has been five or six months with the batteries running down in there, but at the time it did work and the other thing that Colon knows is that he asked Lonnie Joe to tell on who it was with him. That's the significance of this. He said: "Now, look, you are not going to take all of this by yourself. Tell us who that other guy was." And Lonnie Joe says "no", there was no other guy. And he says: "Well, why are there two jackets there?" And Lonnie Joe says: "They both belong to me." Now that is not controverted whatsoever. It is not controverted that Lonnie Joe is the man that Miss Ellison saw here. [120] It is not controverted that Lonnie Joe is the man that Davis caught up here (again pointing to blackboard sketch). It is not controverted that Lonnie Joe had that bag (pointing to bag on reporter's desk) and that radio (pointing to radio) with him. It is not controverted that both of those jackets belong to Lonnie Joe. At least, that is what he told the police department. But, at any rate, that is all we have to go on because he told the police department that both of them belonged to him.

Sometimes juries get the idea that the only way that you can convict in a case like this is if you have a moving picture of Lonnie Joe Carter knocking the hole in there and reaching in, but that is not true. Circumstantial evidence lots of times is even stronger than even an eyewitness. Now, let's look at this. It is true that this is circumstantial evidence but it is sort of like finding someone with jam all over his face among other things. You have got an idea. You didn't see them but you know they have got jam all over their face and the chances are they did. Now, that is circumstantial. Tracks across the sand—you didn't see the man go but there are the bare footprints in the sand. That's circumstantial but someone crossed there and you can say as a certainty that they did. If Lonnie Joe didn't do this, what were

his jackets doing in that alley? The police say that he probably took them off while he was [121] breaking in there and there is nothing else in the record for you to find otherwise. Why did he run away, when they flashed the light down there? It could been that it was his supper time but that's not in the record. The police believe he did it because he did not want to get caught breaking in there. What was he doing in the alley anyway at 2:00 a.m. in the morning? What was he doing up there if he wasn't breaking in that building? What was he doing with an empty bag like this (picking up Commonwealth's exhibit, the bag)? What purpose would a man have in an alley at 2:00 a.m. with a bag like that and what purpose would he have with a radio that picks up police calls? Has that been explained to you? If it wasn't—if this bag wasn't to carry off the loot in and the radio wasn't to listen for police calls, what were they for? The police tell you that is what they believe it was for. And you have nothing else to go on. Why is there an ear plug in that radio? To make it play softly so that it cannot be heard from the street; that the man wearing the ear plug can hear the police and no one else would know the radio is on.

Another thing, why didn't Lonnie Joe stop? If he is not guilty and if hadn't been down to that scene why did he not stop when he nearly ran over the police car here when Mr. Davis yelled to him to stop? Why did he keep running? Why did he throw that bag and that radio away? Can [122] that be answered? It looks like a good bag and it looks like a good radio. It is a good radio for picking up police calls. Why throw that away?

You, the jury, has every right to use your common sense when you go back there in the room to decide these cases. I think everyone of you know exactly what all of these pieces of evidence point to, the jackets, and the radio, the running, the time. Now we say and the police department says there could be no other reasonable

explanation for a man running away from a hole in a wall at that time of morning and leaving his jackets by the hole and throwing away his police radio and his bag to carry the loot in and not stopping when the police department asked him to; there could be no other explanation but that he is running from that break-in which he did. Now, you can draw that conclusion. It's a reasonable conclusion. And it is the only conclusion that you can draw from the evidence that you have heard here today. Do you understand me? It's the only conclusion that you can draw.

Now, Mr. Rogers wants to blame this whole thing on the police department. I don't know why they would want to pick on Lonnie Joe Carter but evidently that is what he is saying by telling you that this case could have been proved against Lonnie Joe perfectly if they had taken fingerprints. Well, I want to try to correct maybe a [123] misapprehension that you have. Fingerprints are not the crime fighting tool that you think they are. With items like this (picking up Commonwealth's exhibit, a hinge) this rough metal and this rough box (picking up box of hinges) and that fact that numerous people were out there and picked up that stuff would ruin any possibility of identifying fingerprints, but, secondly, the main thing was, this fellow had gloves. You heard them talk about that. They took the gloves away from him and they figured with gloves on there would be none. Mr. Rogers talked about the lab. The lab, it is true that we have a lab, but they serve as one lab and it is in Frankfort and it serves the entire state and it has been five months since this was sent up there and that is not an unreasonable time for them and he says to you that I could have continued the case until a later time. Well, I see no reason to. The proof seems to me to be here as good as it will ever be.

Now, I am going to ask you, as I have said before, satisfy yourselves, that if he didn't do this, why did he do all of these other things? You satisfy yourselves

of each one of these if you can before you turn him loose. And you are going to have to satisfy yourselves on what you have heard up here today. You look at each one of these events. Remember, they never lost sight of this man. Someone was watching him from the very time that he was squatted [124] down by that hole; where his two jackets were left. They watched him all the time and he run right through here (pointing to sketch on blackboard) and until he dumped off his police radio and his loot bag and was caught. Remember that, he was never lost.

We ask you to find the man guilty. It carries from one (1) to five (5) years and we are not going to ask that you be exceptionally rough on him just find the man guilty and give him a sentence of between one (1) and five (5) years.

Thank you.

THE COURT: Mr. Sheriff, you may show the jury to their jury room.

WHEREUPON, at this time the Sheriff showed the jury to their room and the instructions of the Court and exhibits of the Commonwealth were also given to one of the jurors as they left the courtroom.

After the jury had deliberated for quite sometime one of the jurors advised the Sheriff that the jury needed to ask the Court a question and at this time the Sheriff advised the Court of this fact and the Court advised * * *

* * * *

COMMONWEALTH'S EXHIBIT 15

YOUR RIGHTS

Place Hopkinsville Pol. Dept.

Date 12/22/78

Time 2:11 A.M.

Before we ask you any questions, you must understand your rights:

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions, and have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions, I do not want a lawyer at this time. I understand and know what I am doing. No promise or threats have been made to me and no pressure or coercion of any kind has been used against me.

Suspect refused to answer questions.

Signature _____

Witness: C. R. Beard—#9

Witness: Illegible

Time: 02:18

RENDERED: May 13, 1980
Not to be published

SUPREME COURT OF KENTUCKY

No. 79-SC-452-MR

LONNIE JOE CARTER, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE STEPHEN P. WHITE, JUDGE

Indictment No. 79-CR-24

MEMORANDUM OPINION PER CURIAM

AFFIRMING

Lonnie Joe Carter, the appellant, was indicted by the February 1979, Christian County Grand Jury for third-degree burglary (KRS 511.040) of Young's Hardware Store in Hopkinsville, Kentucky. Appellant was also indicted as a persistent felony offender pursuant to KRS 532.080.

In the early hours of December 22, 1978, Officer Ellison of the Hopkinsville City Police Department, while on routine patrol through the downtown area, passed by the alley between Young's Hardware Store and Edna's Furniture Store and noticed something in the alley. When she flashed her spotlight down the alley she saw two black males kneeling in the alley. The men took off running and Officer Ellison radioed Officer Davis, who was also on patrol in the area. Officer Davis saw the two suspects running away and took off after them. The two men split up. Officer Davis pursued and caught one of them. It turned out to be Lonnie Joe Carter, the

appellant. During the course of the chase, the appellant dropped two objects, which turned out to be a gym bag and a police band portable radio. The appellant was wearing gloves but no jacket, despite the fact that it was a bitterly cold night.

After calling Officer Davis, Officer Ellison inspected the wall of the building and found a sizeable hole. She also noticed that some items of merchandise from inside the store had been removed and were in the alley. Also in the alley were two jackets. Upon hearing that Officer Davis had one of the men in custody, Officer Ellison went to where the man was being detained and noted that he had on the same color clothes as one of the men she had seen in the alley.

After being taken to police headquarters and being booked, the appellant was read his Miranda rights (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)) and was asked by Officer Ellison and Davis if he would like to sign the standard waiver form and make a statement. The appellant indicated that he understood his rights, but that he did not care to make a statement at that time. Shortly thereafter, Rusty A. Colon, a Major with the Hopkinsville Police Department, entered the room and started a conversation with the appellant, during which the appellant made certain incriminating statements which are in issue in this appeal.

A trial was held on May 17, 1979, in the Christian Circuit Court at which the appellant was found guilty of third-degree burglary and of being a first-degree persistent felony offender. The appellant received sentences of two years and 20 years' imprisonment, respectively, for these convictions. On this appeal nine alleged errors are presented.

I

> "Appellant has been denied his rights against compulsory self-incrimination and to counsel in violation of the 5th, 6th and 14th amendments to the United States Constitution and Section 11 of the

Kentucky Constitution when the police failed to 'scrupulously honor' his decision to remain silent."

The record reflects that the appellant was, promptly after his arrest, advised of his Miranda rights by Officer Ellison. During her interrogation by the Commonwealth, Officer Ellison explained that the appellant refused to waive his Miranda rights, refused to make a statement, and requested a lawyer. Shortly thereafter, Major Colon, in the absence of the other officers, talked to appellant for a few minutes about the crime. Counsel for appellant did not object to this line of interrogation and, as a matter of fact, in his cross-examination pursued the same line of inquiry.

In Spillman v. Commonwealth, Ky., 465 S.W. 2d 925 (1971), this court was confronted with a situation similar to that now presented. In disposing of the issue, we said "(t)he failure to raise the question in the trial court precludes its consideration on appeal."

The appellant made no objection; consequently, the issue was not preserved for appellate review.

II

"Testimony by Officers Ellison and Davis that appellant refused to answer police questions and introduction of a Miranda waiver form indicating appellant refused to waive his rights deprive appellant of his federal and state constitutional rights to remain silent."

Counsel for appellant argues that in spite of his Miranda protection, the length of time it was brought to the attention of the jury constitutes a violation of this protection. We need not reach this charge since no objection was made at the time the issue first presented itself. Spillman v. Commonwealth, supra. The one and only objection made by appellant's counsel had nothing to do with Miranda-rights protection. It pertained to hearsay evidence contained in an answer. The Common-

wealth's Attorney asked Officer Ellison whether she had any conversation with the appellant about this crime. The following is reflected by the record:

> "A. No, sir, when we brought him down to the station he didn't want to say anything. There was another officer there who did say something about whose coats they were and Mr. Carter said that they were his coats.
>
> Objection by Hon. W. E. Rogers, III:
>
> Judge, I object to the hearsay.
>
> The Court:
>
> Yes, that is hearsay testimony and I believe you will have to get that from another party."

The court sustained the objection, and no request for an admonition was sought and none was given by the court. Evidently, counsel for appellant was satisfied with having his objection sustained without having the court admonish the jury. In this situation the issue is not preserved for appellate review. Brock v. Commonwealth, Ky., 391 S.W. 2d 690 (1965).

III

> "The trial court denied appellant due process of law and a fair trial by failing to hold an evidentiary hearing, out of the presence of the jury, regarding appellant's incriminating statements pursuant to RCr 9.78."

Counsel for appellant argues that RCr 9.78 mandates that the trial judge hold a hearing out of the presence of the jury before admitting incriminatory statements which were supposed to have been made by appellant after having been given his Miranda warning. RCr 9.78 provides that if there is a timely objection made to such testimony, then, and in that event, the court must hold such a hearing. In this case there was no objection. The

objection to which counsel for appellant makes reference appears in the Commonwealth's Attorney's opening statement to the jury. Remarks made by Commonwealth's Attorney in his opening statement are what he expects to prove. Objections to such statements do not obviate a challenge when the objectionable line of testimony is sought to be pursued in the course of the trial. The opening statement does not constitute the admission of evidence within the terms of RCr 9.78. This issue was not preserved for appellate review.

IV

> "The trial court's refusal to instruct the jury regarding appellant's right not to testify, in light of the facts of this case, violated the 5th and 14th amendments and Section 11 of the Kentucky Constitution."

The appellant did not testify. His counsel argues in the alternative, the appellant was entitled to an instruction on his right to remain silent and not testify or if he is not entitled to such an instruction then, and in that event, the comments of the Commonwealth's Attorney in his closing summation to the jury concerning appellant's failure to testify were prejudicial error.

KRS 421.225 provides:

> "Testimony of defendant.—In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him."

In Green v. Commonwealth, Ky., 488 S.W. 2d 339 (1972), this court had under consideration a request by an accused that the court instruct the jury that no inference of guilt should be drawn from his failure to testify. This question was considered by this court and

we concluded that, "(t)he trial court did not err in refusing to give Green's requested instruction."

Appellant's latter argument that the comments of the Commonwealth's Attorney in his closing statement to the jury were prejudicially erroneous is no more meritorious than the argument for an instruction on his failure to testify. Counsel for appellant was afforded the privilege of making the first summation to the jury. The Commonwealth's Attorney was then afforded the privilege of concluding the arguments, readying the submission of the case to the jury for its consideration. The closing summation for the appellant commences as follows:

> "Ladies and Gentlemen of the Jury, I am sure you all right now are wondering well what has hapened? Why didn't Mr. Carter take the stand and testify? Let me tell you. * * * He doesn't have to take the stand in his own behalf. He doesn't have to do anything. * * *"

The comments of the appellant's attorney were an invitation for the Commonwealth's Attorney to attack, which he did. The error on the part of the court, if any, was at the invitation of appellant and he will not now be heard to complain. Wright v. Jackson, Ky., 329 S.W. 2d 560 (1959). Irrespective of the characterization made by appellant's counsel of the Commonwealth's Attorney's closing argument, there was no objection made to any of it. It is now too late to cry foul.

V

> "The trial court abused its discretion and denied appellant due process of law by permitting the Commonwealth to impeach appellant with prior felonies which were in issue during the second (P.F.O.) phase of the trial."

It is clear that the appellant did not take the stand; consequently, there was no impeachment.

The appellant also argues that after he had been found guilty of the primary offense, third-degree burglary, the court should have impanelled a new jury to hear the persistent felony charge. This argument was discussed in Brown v. Commonwealth, Ky., 551 S.W. 2d 557 (1977). We hold to the contrary. The trial court did not err in this respect.

VI

> "The trial court denied appellant due process of law by refusing to declare a mistrial and by refusing to exclude incriminating statements when it became clear that the prosecutor had not disclosed physical evidence and incriminating statements as requested."

Appellant filed a request for a bill of particulars on February 28, 1979. One of the requests was "A copy of any statement, written or oral, made by the Defendant or any co-defendants." In response, the Commonwealth's Attorney answered "None." The incriminating statements to which counsel for appellant now refers are those to which the Commonwealth's Attorney made mention in his opening statement. We have heretofore opined that the issue as to the competency of the incriminating statements was not properly preserved for appellate review since appellant's counsel had not objected when the questioned testimony was offered.

The request for the bill of particulars filed was sufficiently broad in other sections thereof to have required that their existence and the intent of the Commonwealth's Attorney to use them on trial should have been disclosed to counsel for appellant with the other disclosures. This was not done. The existence of the gloves was made known in the testimony of Officer Davis and was pursued in the cross-examination by appellant's counsel. No objection was made when the question arose; however, at the conclusion of Officer Davis' testimony, appellant's counsel made a motion for a mistrial, which was denied.

Objections to a particular question or to a particular line of interrogation must be made when the testimony is offered. No objection was made when Officer Davis disclosed the existence of the gloves. The objection was first made after this witness had been interrogated both by the Comomnwealth's Attorney and the appellant's counsel. Appellant cannot now complain.

VII

> "The trial court denied appellant due process of law by instructing the jury that pre-trial incarceration would count toward any sentence imposed and by refusing to instruct the jury regarding the ten year mandatory sentence without parole for first degree persistent felons.

A. Pre-trial incarceration"

In appellant's closing argument to the jury his counsel said:

> "Now, I want to tell you something. The police and the prosecution and the state are not helpless. Now, this man (again pointing to defendant) is helpless. He has been in jail five (5) months while they have had the laboratories and the investigators and that's good; I am glad that we have that. * * *"

After the case was submitted to the jury for a verdict, the jurors returned into open court and asked:

> "We would like to know if time served now will be included in the sentence or if. . .
>
> The Court:
>
> Do you mean to be asking me whether or not he will be given credit for that time? Is that what you are saying?

Terry Hamby—one of the jurors:

Yes, sir.

The Court:

Let me say to you, Ladies and Gentlemen, that ordinarily I wouldn't answer that question except for one fact and that is, his confinement in the local jail prior to this trial, I believe it was five (5) months or something of that sort, was mentioned in the final argument in the case. That is where you got it. If that had not happened I think probably I would not be permitted to answer your question, but since it happened in the way it did I am simply going to tell you that under Kentucky Revised Statutes, Section 532.120, subsection 3, reads as follows:

> 'Time spent in custody prior to commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the Court imposing sentence towards the serving of the maximum term of imprisonment.'

That's the end of the quotation but to simplify that, to bring it down to what you and I understand, 'yes, he gets credit for time served.' "

After the jury returned to the jury room, counsel for appellant and the trial judge had the following colloquy:

"Motion by Hon. W. E. Rogers, III:

Judge, I object to that request and move for a mistrial on that basis:

The Court:

I will overrule the motion. Mr. Rogers, you are the one that brought up the five (5) months that defendant has been in jail."

The error, if any there was, on the part of the trial judge was invited by appellant's counsel and he cannot now complain.

"B. Mandatory No-Parole Term"

At the conclusion of the persistent felony phrase of the trial, counsel for appellant requested the court to inform the jurors that under the law a conviction of being a persistent felon would prohibit the defendant from receiving probation or parole and they should take that into consideration in setting their sentence. KRS 532.080(7). The court refused to give such an admonition to the jury. The function of the jury is to determine guilt or innocence and to determine sentence if guilt is found. The possibility of pardon or parole is not a proper consideration for the jury in making its determination. In fact, the entire matter of parole is beyond the province of the jury. Brown v. Commonwealth, Ky., 445 S.W. 2d 845 (1969); Green v. Commonwealth, Ky., 556 S.W. 2d 684 (1977). Since the entire matter of parole is beyond the province of the jury, it is clear that the trial judge is under no obligation to instruct the jury on this matter.

VIII

"Appellant was denied due process by the failure of the trial judge to instruct as requested by the defense that the Commonwealth had the burden to prove each essential element beyond a reasonable doubt."

The trial court in instructing on reasonable doubt said:

"You will find the defendant guilty if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this County on or about the 22nd day of December, 1978, and before the finding of the indictment herein, he entered the store building known as Young's Hardware at 112 East 6th Street in the City of Hopkinsville without permission from

the owner or any other person authorized to give such permission;

(b) That in so doing he did not have such permission;

and

(c) That he did so with intention of committing a theft."

The appellant argues that the court should have instructed the jury that it must believe each element of the offense beyond a reasonable doubt before a conviction can be had rather than relying on the preliminary statement of reasonable doubt to apply to each element of the offense. We are of the opinion that today's jurors are sophisticated enough to realize that the reasonable doubt qualification given at the beginning of each separate instruction applies with equal force to each element of the offense thereafter set forth in that instruction. The instructions given by the court properly presented the reasonable doubt requirement.

IX

"Appellant was denied due process of law in violation of the 14th amendment by the entire P.F.O. hearing, because there was no proof, or instructions on, essential elements of the offense, no instruction on 2nd degree PFO, evidence of other unrelated charges and/or another conviction, and an admission of guilt by counsel without an on the record inquiry of appellant."

This argument is directed solely at the persistent felony phase of the trial. Appellant now complains that, (1) the circuit court clerk read to the jury from the indictments; (2) there was no proof of at least two essential elements of the crime with which the appellant was charged; (3) the essential elements of the offense were omitted from the court's instructions; and (4) the

instructions did not afford the jury the privilege of determining whether the appellant had committed only one of the previous convictions.

Counsel for appellant did not offer any objection to the clerk's reading from the indictments, nor to the failure of the proof, nor to the instructions themselves. The integrity of the appellant in admitting what the Commonwealth had already proved does not detract from his plea for mercy for appellant. It logically would improve the appellant's chances for a minimum sentence from the jury.

When the alleged errors are stacked one on top of the other, it appears to us that the appellant received a fair trial, at least a tolerably fair trial. Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974); MacDonald v. Commonwealth, Ky., 554 S.W. 2d 84 (1977); Berning v. Commonwealth, Ky., 550 S.W. 2d 561 (1977).

The judgment is affirmed.

All concur, except Stephens, J., who did not sit.

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SUPREME COURT OF THE UNITED STATES

No. 80-5060

LONNIE JOE CARTER, PETITIONER

v.

KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 6, 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 332296 122

NO. 80-5060

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

LONNIE JOE CARTER — PETITIONER

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether it is a denial of Fifth and Fourteenth Amendment rights for a state court in a criminal case to refuse to instruct the jury that the defendant is not compelled to testify.

OPINION BELOW

The opinion below from the Supreme Court of Kentucky is styled Lonnie Joe Carter v. Commonwealth of Kentucky. It is a memorandum opinion per curiam, is unpublished and dated May 13, 1980. The opinion of the Kentucky Supreme Court is correctly set out in the appendix of the petitioner's petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has correctly set forth in his brief all of the constitutional and statutory provisions needed to resolve the issues presented.

JURISDICTION

Petitioner's application for a writ of certiorari complies with the prerequisites of 28 U.S.C. 1257(3). The petitioner, however, has failed to demonstrate a conflict between the decision of the Kentucky Supreme Court and any provisions of the United States Constitution or decisions of this Court so as to warrant a review of the decision of the Kentucky Supreme Court. Accordingly, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

Respondent accepts as being substantially correct the procedural history and the material facts as presented in the petition. Certain aspects of the underlying facts, however, need emphasis or clarification.

Petitioner was found guilty after a jury trial of third degree burglary and was sentenced to two years. In a second

phase of the trial he was found guilty of being a persistent felony offender and sentenced to twenty years' imprisonment.

Officer Elliston of the Hopkinsville Police Department was on patrol on December 22, 1978, at approximately 1:50 a.m., in downtown Hopkinsville. She observed two black males along the side of a building in an alley. When they saw the officer, the individuals began running. When the officer maneuvered her cruiser down the alley, she saw a hole had been knocked in the side of a building housing Young's Hardware. There were two coats lying at the scene of the crime and some other items which she believed came from the store

Officer Elliston gave out a call on the police radio that there were two black males in the alley behind Young's Hardware running towards Fifth Street in Hopkinsville. Officer Leroy Davis gave chase and finally stopped petitioner. Petitioner had items in his hand which he dropped during the chase. These items included a bag and a police radio scanner set at the local police channel.

The items found outside of the hole in the wall of the building housing Young's Hardware were identified as having come from Young's Hardware. Petitioner was taken to the police station and advised of his "rights." He originally indicated he did not want to make a statement, but later stated that he was by himself during the commission of the crime and that coats found at the scene belonged to him.

During the trial on the burglary charge petitioner was advised that if he should take the stand his prior felony convictions would be brought up for impeachment purposes. Petitioner chose not to take the stand.

Counsel for petitioner requested that the court give the jury an instruction to the effect that the defendant is not compelled to testify. This requested instruction was refused by the court. Counsel for petitioner, however, did explain to the jury that petitioner did not take the stand and testify because he was not required to. Counsel for petitioner further noted that his client does not have to do anything.

After conviction petitioner appealed to the Kentucky Supreme Court. Petitioner's appeal complained of some nine different allegations of error, including the one issue presented to this court on the petition for certiorari. The Kentucky Supreme Court ruled that each of the allegations of error was without merit and affirmed the lower court judgment. In concluding that the trial court did not commit error by refusing an instruction to the jury regarding petitioner's right not to testify, the Kentucky Supreme Court pointed to Kentucky Revised Statute 421.225, which provides:

> "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him." [Emphasis added].

The Kentucky Supreme Court in a prior decision of Green v. Commonwealth, Ky., 488 S.W.2d 339 (1979), had ruled that it was not error to refuse an instruction submitted by a defendant concerning the defendant's right not to testify. In petitioner's appeal, the Kentucky Supreme Court reaffirmed its decision in Green v. Commonwealth, Supra.

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

ARGUMENT

There does not exist a conflict between the decisions of this court and the Kentucky Supreme Court concerning an instruction regarding a defendant's right not to testify.

Petitioner primarily relies upon three decisions by this Court for his position that the decision of the Kentucky Supreme Court should be reviewed. Bruno v. United States, 308 U.S. 287 (1939); Griffin v. California, 380 U.S. 609 (1965); and Lakeside v. Oregon, 435 U.S. 333 (1978). The rationale in these three decisions does not conflict with the rationale of the Kentucky Supreme Court in such manner as to require review of the Kentucky Decision.

In Bruno v. United States, Supra, the court had the "narrow question" before it as to whether a specific federal

statute required a federal trial court to instruct the jury upon request that the failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him. The court held that an accused should be allowed to make his own choice of whether such an instruction should be given when an ". . . Act of Congress authorizes him to choose." Id., at 294. It should be noted that the federal statute [then 28 U.S.C. 632] stated an accused's failure to make a request to testify shall not create any presumption against him. The Kentucky statute, however, (Kentucky Revised Statute 421.225) states that an accused's failure to testify ". . . shall not be commented upon or create any presumption against him." It is therefore apparent that the federal statute in question in Bruno, supra, and the Kentucky statute are not similar, since the Kentucky statute specifically prohibits comment on an accused's failure to testify.

Petitioner's reliance upon Griffin v. California, supra, is similarly misplaced, since that case dealt with a problem not present herein. The court in Griffin held that a provision of the California Constitution which permitted both the prosecuting attorney and the court to comment on an accused's failure to explain or deny by his testimony any evidence or facts in the case against him was violative of the federal constitution. In the present case from Kentucky, there was no comment made on petitioner's failure to testify.[fn] In a footnote the court in Griffin, supra, specifically stated:

> We reserve decision on whether an accused can require as in Bruno v. United States . . . that the jury be instructed that his silence must be disregarded." Griffin, supra, at 615, n6.

Petitioner's reliance on Lakeside v. Oregon is equally incorrect. In Lakeside the court held that when a trial judge

---

fn Petitioner makes passing comment in his brief before this Court that the prosecutor made indirect comments about petitioner's failure to testify. (Petitioner's brief p. 5.) Such a contention does not appear to be supported by the record and was not an issue presented to the Kentucky Supreme Court on appeal.

gave the instruction concerning failure to testify over the objection of a defendant, there was no error. The court noted that there has been debate over the years as to whether it is better to give a cautionary instruction of this type or whether it is better to say nothing about a defendant's silence. The court touched on the gravimen of this case by stating:

> "It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each state is, of course, free to forbid its trial judges from doing so as a matter of state law. . . ." [Emphasis added]. Lakeside v. Oregon, 435 U.S. 340.

It is apparent through a reading of Lakeside v. Oregon in combination with Bruno v. United States and Griffin v. California, supra, that this court has decided to leave to the states the question of how best to handle the knotty problem of whether a jury should be instructed on a criminal defendant's failure to testify. The Commonwealth of Kentucky has determined that the best method of protecting an accused's Fifth Amendment right is to say nothing to the jury about his failure to testify. It is apparent that the intent of the general assembly of Kentucky is to insure that adverse effects from the failure to testify do not prejudice an accused. Accordingly the decision of the Kentucky Supreme Court is consistent with the federal cases on the subject.[fn2]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Supreme Court of Kentucky should be denied.

Respectfully submitted,

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fn2 It should also be noted that the jury was told by defense counsel that petitioner was not required to take the stand and testify.

NO. 80-5060

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

LONNIE JOE CARTER — PETITIONER

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

CERTIFICATE OF SERVICE

I, Robert V. Bullock, counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of August, 1980, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by placing a copy of same in the United States mail, first-class postage prepaid, and addressed to Kevin Michael McNally, Esq., Assistant Public Advocate, Office for Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601, Counsel for Petitioner.

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No. 80-5060

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LONNIE JOE CARTER, *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, *Respondent.*

On Writ Of Certiorari To The Supreme Court of Kentucky

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is it a denial of a criminal defendant's Fifth and Fourteenth Amendment rights against compulsory self-incrimination and to due process of law for a state court to refuse the defendant's request to instruct the jury that "the defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way" when the defendant declines to testify for a reason unrelated to guilt or innocence and comment is made at trial by counsel and police witnesses regarding his failure to explain himself to the police and/or failure to testify at trial?

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OPINION AND JUDGMENT BELOW

Judgment was entered by the Christian County, Kentucky, Circuit Court on June 1, 1979 [Joint Appendix, hereinafter A, 9-10]. The opinion of the Kentucky Supreme Court was rendered on May 13, 1980 and is not reported [A, 73-74].

JURISDICTION

The opinion of the Kentucky Supreme Court was entered on May 13, 1980. No rehearing was sought and the mandate of the Kentucky Supreme Court was issued on June 3, 1980. The petition for writ of certiorari was filed on July 17, 1980 and was granted October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the United States Constitution, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury . . .

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part:

> . . . nor shall any State deprive any person of . . . liberty . . . without due process of law . . .

STATEMENT OF THE CASE

Lonnie Joe Carter was indicted by the February, 1979 Christian County Grand Jury for third degree burglary of Young Hardware in Hopkinsville. Kentucky Revised Statute

(hereinafter KRS) 511.040.[1] The indictment alleged that Carter ". . . on or about December 22, 1978 . . . unlawfully entered the store building known as Young Hardware, with intent to commit a crime . . ." The indictment also charged petitioner with being a persistent felony offender in violation of KRS 532.080.[2] It was alleged that petitioner was convicted of the

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[1] KRS 511.040 states: "(1) A person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in an uninhabited building. (2) Burglary in the third degree is a Class D felony." A Class D felony is punishable by ". . . not less than one nor more than five years" imprisonment. KRS 532.060(2)(d).

[2] Although the indictment did not state which degree of persistent felon was alleged, the specification of two prior felonies suggested a persistent felon first degree charge. KRS 532.080 states, in part: "(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (6) of this section shall be determined in a separate proceeding from that proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose.

* * *

(3) A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies . . .

* * *

(6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows . . .

(b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten years nor more than twenty years.

(7) A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten (10) years."

prior felonies of "Storehouse Breaking"[3] in 1973 and "Knowingly Receiving Stolen Property Over $100.00"[4] in 1977 [A, 3-4].

Petitioner's trial was held May 17, 1979 [Transcript of Evidence, hereinafter TE, 1]. The voir dire examination of the prospective jurors was conducted solely by the trial judge [A, 12-16]. Judge Stephen P. White read the indictment to the jury. He inquired whether the fact that the defendant ("the black man sitting next to his attorney . . .") is "of another race" would preclude a fair trial [A, 12]. Judge White inquired as to any influence of publicity regarding the case and any relationship to counsel or the defendant. The veniremen "nodded negatively" to each question [A, 12]. The prospective jurors indicated that any experience as, or relationship to, a victim of crime would not influence their judgment [A, 13]. Although various jurors were related to law enforcement personnel, this was said to have no bearing on their judgment [A, 14]. Judge White then stated "as you may have heard me explain before in the courtroom . . . [t]he fact that his man is under a charge or has been indicted has no weight against him as evidence . . . He sits there before you today presumed by the law to be as innocent as anyone else in this courtroom" [A, 14 — 15]. Judge White also referred to the Commonwealth's responsibility to "prove his guilt to your satisfaction beyond a reasonable doubt . . . [which] means exactly what it says. There's nothing technical about it and it shouldn't give anybody any trouble" [A, 15]. Voir dire was completed when the trial court received a negative answer to the question of whether there was "anything that I have not thought of that would . . . disqualify you. . . ." [A, 15].

The prosecution's opening statement recounted the evidence expected to be introduced at trial aganist petitioner

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[3] KRS 433.190 (since repealed). "Storehouse breaking" is the forerunner of KRS 511.040, punishable by 1 to 5 years imprisonment.

[4] KRS 514.110, also a Class D felony. See n.1, *supra*.

[TE. 16 — 21]. A defense objection was overruled when the prosecutor mentioned that three police officers would testify regarding the questioning of Mr. Carter [TE, 20]. The prosecutor concluded that "We will put on this evidence . . . four, or possible [sic] five witnesses . . . and the Court will then instruct you . . . " [TE, 21]. Defense counsel's opening statement began:

> Let me tell you a little bit about how this system works. If you listened to Mr. Ruff you are probably ready to put Lonnie Joe in the penitentiary. He read you a bill, a true bill that was issued by the Grand Jury. Now, the Grand Jury is a group of people that meet back here in a room and the defendant is not able or not allowed to present any of his testimony before this group of people. The only thing that the Grand Jury hears is the prosecution's proof and I would say approximately what Mr. Ruff has said to you. I suppose that most of you would issue a true bill if Mr. Ruff told you what he has just told you and you didn't have a chance to hear what the defendant had to say for himself.
>
> Now, that is just completely contrary to our system of law. A man, as the Judge has already told you, a person is innocent until they are proved guilty . . ." [A, 16-17].

Defense counsel noted the prosecution must prove guilt beyond a reasonable doubt. He concluded: "As they will and as you have heard, they have got a lot of pieces tied up here but there are a lot of pieces that are missing too . . . Listen to this case with an open mind all the way through it and don't make up your mind until . . . all of the evidence is in . . ." [A, 17].

The first witness at trial was Officer Beborah K. Ellison of the Hopkinsville Police Department (H.P.D.) [A, 18]. Officer Ellison was on downtown patrol in her squad car on the night of December 22, 1978, shortly before 2:00 A.M. [A, 18]. it was a "quiet" night although "several people" were on Virginia Street nearby "where the bars are" [A, 18]. "[O]n Sixth Street in between Main and Virginia . . . " Ellison noticed something in the alley next to Young hardware. She

backed her car up and turned on her spotlight [A, 19]. Two black males were "stooped along the side of the building." They "took off running." Officer Ellison "maneuvered the cruiser down through the alley . . . [and noticed] a hole knocked in the side of Young hardware . . . " She called for assistance from Officer Davis who she knew was in the area. Ellison attempted to pursue the "two subjects, one was tall and thin, and was wearing rust colored slacks and a dark colored shirt and he was carrying some items in his hand and the other subject was short and stocky and he had a light colored type jersey shirt on and . . . dark colored slacks . . . " The "short subject just disappeared . . . " He didn't appear to be carrying anything [A, 19, 30]. The "tall thin one" ran "toward Fourth Street" and Officer Ellison "lost sight of him completely . . . " [A, 19]. Ellison drove through the alley, turned right on Fifth Street, left on Virginia Street and left on Fourth Street, "I didn't see any sight of them." She turned around and made another left on Virginia, heading to Third Street. At about that time "Officer Davis said he had one of them in custody" [A, 19 — 20, 31 — 32]. Ellison drove down Third to Main and returned to the alley. She testified that the incident lasted two or three minutes [A, 20, 32]. In the alley, Ellison observed that some bricks had been removed from the wall of Young hardware. A few "items" were lying near the wall. There were also two coats [A, 20]. In searching the scene, no burglary tools or crowbars were found [A, 34-35].

Officer Davis then "brought the subject around for me to identify . . . " Ellison stated that the "subject" (petitioner) "appeared" to have the same clothing "the man I saw running" [A, 22]. The person that ran off did not have a coat on although it was "rather cold" [A, 23]. Officer Ellison admitted that "it was fairly dark in the alley and I didn't get a real close look of [sic] his face" [A, 29]. She was not able to "identify any features of either of . . . [the men], just their physical outline, height and width" [A, 30].

When petitioner was brought to the police station, "he didn't want to say anything" [A, 23]. After a "hearsay" objection was overruled, the prosecutor returned to the subject of petitioner's refusal to make a statement:

> Q At that time did he make a statement?
>
> A No, sir, he did not and he would not waive [sic] a waiver certificate either.
>
> Q And he refused and he did not want to make a statement?
>
> A That's right, sir.
>
> THE COURT: Just a minute, Mr. Ruff, let me ask a question. [A, 24].

Judge White then inquired of Officer Ellison in the presence of the jury whether Mr. Carter was given "his full Miranda rights." Ms. Ellison replied that petitioner was read "the standard certificate" [A, 24]. Mr. Ruff then again focused upon petitioner's reticence:

> Q And did you then fill this out and present it to him for his signature?
>
> A Yes, sir.
>
> Q And he did not desire to sign that, is that correct?
>
> A That's correct.
>
> Q But you showed him what his rights were and he evidently understood them because he said that he did not want to make a statement, is that correct?
>
> A Yes, sir. [A, 25].

The "waiver form" was introduced into evidence [A, 25]. On the form, the police wrote: "Suspect refused to answer questions" [A, 72; Cw.Ex. 15]. However, Officer Ellison went on to testify that when petitioner was questioned later by Major Colon, petitioner admitted he was "by himself" and that "both . . . coats belonged to him . . ." [A, 25].

Officer LeRoy Davis, H.P.D., was the next witness [A, 37]. On the night in question, Officer Davis was in his patrol

car at the corner of Fifth and Virginia "observing" some people on the street when he "heard Officer Ellison give out a call that there were two black males in the alley . . . beside Young Hardware . . ." [A, 37]. He saw two figures run across Fifth Street and go in opposite directions. Davis drove down Virginia Street, losing sight of the person, until apparently the same individual ran across Fourth Street [A, 37-38]. Davis continued driving a parallel course, again losing sight of the person, took a left on Third Street, stopping by an alley just as petitioner appeared [A, 38]. Petitioner refused an order to stop, but did so when Officer Davis left his vehicle and gave chase [A, 38]. Davis testified that petitioner dropped two items — a bag and a radio — shortly before he stopped. The radio was allegedly set on a police band and had an "earphone" although the police officers had trouble getting it to work [A, 40, 50]. Finally, the officer testified that petitioner refused to explain himself under questioning at the police station:

> Q Did you give Lonnie Joe Carter his rights under the Miranda Act or did someone do it?
>
> A It was given to him at the station.
>
> Q Did he make any statement at that time?
>
> A No, he didn't. After we give him his rights we asked him some questions but he really wasn't doing too much talking. [A, 42].

Overruling a defense objection to "leading," the trial court permitted Officer Davis to testify that, after further questioning, petitioner stated: "There was no other guy. Both of these jackets belong to me" [A, 42]. Davis concluded by stating: "shortly after that he would not say anything else" [A, 46].

The third witness was Mack Arthur, owner of Young Hardware Company [TE, 80]. He identified a few items found on the ground outside the hole and testified that "nothing of great value" was removed from the shelf inside

the hole [TE, 80-81]. He explained there was "no entrance gained" because the storage racks blocked the hole [TE, 83].

The last witness was Major Rusty A. Colon, H.P.D. [A, 48]. He testified that he interrogated petitioner (after the other officers had ceased questioning him) without additional "Miranda" warnings [A, 49, 51]. Two or three other officers were present [A, 49]. Colon asked petitioner if he "intended to go it all by himself . . ." [A, 49]. In response petitioner allegedly stated "there was none other than himself . . . both of the iackets were his" [A, 49].

After the Commonwealth rested, a hearing was held regarding whether petitioner would testify and whether the trial court would permit the prosecutor to impeach petitioner with his prior felony convictions [A, 54-59]. Defense counsel stated:

> Judge, I think possibly the only reservation Mr. Carter might have about testifying would be his impeachment by the use of these previous offenses that he is aware of and has told me about. I would like to explain to him in front of you what this all means. [A, 54].

Counsel explained to Mr. Carter that if he testified the Commonwealth could "use the fact that you have several offenses on your record . . . [to] impeach your . . . propensity to tell the truth . . . Counsel added that in his experience this was "a heavy thing; it is very serious, and I think juries take it very seriously . . ." [A, 55]. Judge White noted that under Kentucky law the trial judge "has discretionary control" over the use of prior felony convictions for impeachment [A, 55]. The prosecutor indicated his intention to use the same felony convictions for impeachment which were to be placed in issue in the persistent felon phase of the trial. This was not actually necessary since petitioner had been convicted of other felonies which qualified for impeachment. Judge White aquiesced in this decision:

> THE COURT: . . . Grady, I don't think it is safe for I think you are inviting a reversal on the inflammatory

ground if you get above three and I think three would be the limit that I would let you go and I would suggest that you pick out the most recent ones and if you could avoid the two that are involved in the second stage you would probably be better off.

HON. GRADY RUFF: I can't do that for those are the two most recent ones so that's the way it has to be.

THE COURT: Well, there's no rule that I know of that prohibits using those. It seems a little bit strange that they split the trial and made two stages of it with two aggravating or enhancing convictions or whatever you want to call them. [A, 57].

The record reflects that petitioner decided not to testify based upon the prospect of having to admit his prior convictions which were to be used to enhance his sentence. The trial court personally addressed the defendant:

THE COURT: . . . You can sit there and say nothing and it cannot be mentioned if you don't testify but if you do these other convictions can be shown to indicate to the jury that maybe you are not telling the truth.

LONNIE JOE CARTER: Are you saying the most recent convictions?

THE COURT: Well, they are the ones he plans to use. Now, do you understand what you are charged with?

LONNIE JOE CARTER: Yes, sir.

THE COURT: All right, you talk to Mr. Rogers and then tell us what you want to do.

* * *

THE COURT: Now, Lonnie, you have come back after a private conference with your lawyer, Mr. Rogers and you have told me you have decided not to take the stand?

LONNIE JOE CARTER: Yes, sir [A, 58].

Defense counsel summarized his private conversation with the defendant for the record, observing "that the advice of counsel to Mr. Carter was that in plain terms he was between a rock and hard place . . ."Counsel stated that if petitioner testified he would be impeached as permitted by the trial court and "if he didn't testify the jury, whether Mr. Ruff

commented on it or not, would probably use that against him." Counsel repeated that "the jury, in my experience, would use [the failure to testify] against him . . ." [A, 58-59].

Counsel indicated to the court in chambers that the defense had no other witnesses [A, 59]. Upon return "into open court," apparently in front of the jury, counsel "advised the court that there would be no testimony introduced for and on behalf of the defense" [A, 60]. Defense counsel tendered, and the trail court refused, *inter alia*, instructions or petitioner's right not to testify and on the prosecution's burden of proof.[5] The tendered instruction state:

> Instruction Regarding Defendant's Testimony
>
> The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.
>
> Burden of Proof
>
> In a criminal case, the burden of proof always rests upon the prosectuion. The defendant is under no obligation to prove anything. The prosecution must prove every element of its case beyond a reasonable doubt. [A, 5].

In his closing argument to the jury, defense counsel began as follows:

> Ladies and Gentlemen of the jury, I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify? Let me tell you. The judge just read to you that the man is presumed innocent and that it is up to the prosecution to prove him guilty beyond a reasonable doubt. He doesn't have to take the stand in his own behalf. he doesn't have to do anything. [A, 60].

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[5] Petitioner properly followed Kentucky's "contemporaneous objection" procedure requiring a timely request for any instructions desired in addition to those given by the trial court. KY.REV.STAT., R.CRIM.PROC. 9.54(2) states, in part: "No party may assign as error the . . . failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion . . ." *Cf. Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

The prosecutor began his summation by stating that he intended to review the evidence "that we were privileged to hear" [A, 64]. He cautioned the jury to "[c]onsider only what you have heard up here as evidence in this case and not something that you might speculate happened or could have happened . . . " [A, 64]. Reference was repeatedly made by Mr. Ruff to the fact that the Commonwealth's evidence was "not controverted." After mentioning petitioner's alleged admissions to the police, the prosecutor argued:

> Now that is not controverted whatsoever. It is not controverted that Lonnie Joe is the man that Miss Ellison saw here. It is not controverted that Lonnie Joe is the man that Davis caught up here (again pointing to blackboard sketch). It is not controverted that Lonnie Joe had that bag (pointing to bag on reporter's desk) and that radio (pointing to radio) with him. It is not controverted that both of those jackets belonged to Lonnie Joe. At least, that is what he told the police department. But, at any rate, that is all we have to go on . . . [A, 68].

Mr. Ruff asked the jury what Lonnie Joe's jackets were doing in the alley, arguing that the police believe he took "them off while breaking in there and there is nothing else in the record for you to find otherwise." The prosecutor continued that if there was a reasonable explanation why petitioner ran when he saw the police, it was "not in the record." He argued that various incriminating evidence had not "been explained to you" (the jury) and that other than the police theory "you have nothing else to go on" [A, 69]. "Now we say and the police department says there could be no other reasonable explanation . . . it is the only conclusion that you can draw from the evidence that you have heard here today . . . " [A, 69 — 70]. " . . . [S]atisfy yourselves on what you have heard up here today . . . " [A, 71].

Petitioner was convicted and sentenced to two years [TE, 127]. The recidivist phase of the trail was then held. The prosecution presented two witnesses who testified regarding petitioner's two prior felony convictions [TE, 131 — 137]. The

defense presented no witnesses. The jury found petitioner guilty as a persistent felony offender and sentenced him to the maximum, twenty years imprisonment [TE, 143]. Judgment was entered June 1, 1979 [A, 9 — 10].

On May 13, 1980, the Kentucky Supreme Court affirmed petitioner's conviction. The Court specifically rejected petitioner's argument that the Fifth and Fourteenth Amendments to the United Stated Constitution require that a protective instruction be given (at least under the facts of this case) regaring a criminal defendant's right not to testify when a timely request is made at trial.[6] *Carter* v. *Commonwealth*, File No. 79-SC-452-Mr, Memorandum Opinion Per Curiam at 5-6 [A, 77 — 78]. The Court likewise rejected petitioner's "due process" claim that the tendered burden of proof instruction should have been given [A, 82-83]. The Court stated that "it appears to us that . . . [Carter] received a fair trial, at least a tolerably fair trial . . ." [A, 84].

SUMMARY OF ARGUMENT

A defendant in a criminal trial is explicitly guaranteed the right to decline to testify by the Fifth Amendment to the United States Constitution. This fundamental constitutional right is applicable to state criminal proceedings through the

---

[6] The Court stated the issue being addressed in its opinion:

> "The trial court's refusal to instruct the jury regarding appellant's right not to testify, in light of the facts of this case, violated the 5th and 14th amendments and Section 11 of the Kentucky Constitution" [A, 77].

The fact that the Court reached the federal constitutional issue on the merits is in stark contrast to the Court's refusal to address issues I, II, III, part of IV, VI, and IX as presented in petitioner's brief on appeal due to the failure to properly preserve these contentions at trial [A, 74-80, 83-84]. Some of these issues raised serious federal constitutional claims, such as the failure to "scrupulously honor" petitioner's decision to remain silent during police interrogation, *see Michigan* v. *Mosley*, 423 U.S. 96, 103-104 (1975), and extensive comment on his silence at that time. *See Doyle* v. *Ohio*, 426 U.S. 610 (1976). Petitioner's federal claim is properly before this Court. *Compare Taylor* v. *Kentucky*, 436 U.S. 478, 482 n.10 (1978).

Fourteenth Amendment. An essential aspect of this right is the necessary correlative principle that the defendant must suffer no penalty for the exercise of that right lest the right itself become meaningless. Thus, adverse comment on a defendant's failure to testify by counsel or the court has been prohibited in both federal and state criminal trials.

As any experienced trial counsel or judge recognizes, most jurors will expect a defendant to testify and will note when he does not even in the absence of adverse comment. Research in the social sciences, scholarly writings and opinions of many courts, including this one, have recognized this fact. Because of the natural tendency of many jurors to conclude that a criminal defendant is guilty from his failure to tell "his side of the story." there is an obvious and significant danger that the defendant's failure to testify will enter the jury deliberations and, in the absence of guidance from the court, be used as evidence of guilt.

The Fifth Amendment prohibits compulsory self-incrimination. This Court has wisely recognized that physical compulsion, i.e. torture, is not the only form of pressure prohibited by the Constitution. Adverse use of the invocation of the right not to be "a witness against [one]self" has correctly been recognized as a subtle but effective form of compulsion to testify. similarly, when a trial court permits to go unchecked the natural tendency of jurors to view as evidence of guilt the defendant's failure to testify, the citizen accused is also subjected to a subtle but equally (or even more) effective form of compulsion to testify, In reality, if the right against compulsory self-incrimination is to be more than a mirage, the Fifth Amendment requires some affimative action on the part of the trial court to remove the very real danger that the jury will be unaware of or ignore the command of our Constitution. It is petitioner's position that the traditional method of insuring the integrity of the fact-finding function is to provide proper jury guidance by instruction on basic principles of the applicable law. An instruction to the jury regarding a criminal defendant's explicit constitutional right not to testify is an ap-

propriate and constitutionally required procedure because it removes the very real compulsion to testify out of fear that the failure to do so will be used by a jury as evidence of guilt.

It is significant that at the time the Fifth Amendment privilege was incorporated into the Bill of Rights no adverse inference from its exercise was possible because the defendant was not permitted, and thus not expected, to testify. A prophylactic instruction is now essential to restore the original force of the privilege.

Aside from this Fifth Amendment analysis, the Due Process Clause of the Fourteenth Amendment is an independent and compelling source requiring a prophylactic instruction when a criminal defendant declines to testify. It has long been the law in federal courts that such an instruction is necessary. In so deciding, this Court recognized, as have many lesser authorities and commentators, that there may be valid reasons unrelated to guilt or innocence why a defendant in a criminal case may decline to testify. A particular defendant may, because of his appearance, individual personality, lack of intelligence, emotional situation, cultural background, etc., be unable to communicate effectively his position to the jurors or may otherwise create a poor impression. Additionally, because of the criminal procedure used in most states, criminal defendants who testify are subjected to impeachment by the use of evidence not necessarily relevant to guilt, such as prior felony convictions. In either case, a jury without proper guidance will likely jump to the natural, but wrong conclusion that the defendant remained silent because he is guilty.

Petitioner recognizes, of course, that the failure to give a particular instruction requested by a criminal defendant does not necessarily offend due process even if the instruction is universally approved and obviously desirable as a matter of policy. However, in the present case we are dealing with a requested instruction regarding an *explicit constitutional right*. Certainly, if due process of law means anything, it means that the jury in a criminal trial must be instructed as to what the

United States Constitution clearly requires. The defendant's right to decline to testify is an essential, constitutionally-rooted component of a fair trial under our criminal justice system. The real danger that a jury without proper guidance will use the decision of the defendant not to testify as evidence of guilt is a grave threat to the integrity of the fact-finding function. This danger undermines other fundamental constitutional principles such as the presumption of innocence and the prosecution's burden of proof of each element of the offense beyond a reasonable doubt. No other instruction given in a criminal trial, including instructions on the presumption of innocence and the burden of proof, specifically addresses the danger complained of here. In the absence of the protective instruction requested, the jury may fail to hold the prosecution to its burden of proof, the presumption of innocence could be improperly stripped away and the reasonable doubt standard diluted. While due process of law does not and should not require uniform instructions in criminal cases among the several states, it does and should require, as this Court has held, that a jury in a state criminal trial be given proper guidance regarding fundamental principles of constitutional law (even when the principles are not explicitly mentioned in the Constitution). It follows, *a fortiori*, that the Due Process Clause of the Fourteenth Amendment requires that the requested protective instruction be given because it is essential to proper jury guidance. (and thus the accuracy of the jury verdict), breathes life into an explicit, but normally unappreciated, constitutional guarantee, and prevents erosion of other basic principles which govern our system of trial by jury. In essence, the instruction is essential to a fair trial because of its purging effect.

The need for a particular instruction cannot generally be determined in a vaccum. However, petitioner would suggest that the requested instruction is so fundamental that its refusal in any case where the defendant declines to testify is violative of both the Fifth and Fourteenth Amendments without the need for further inquiry. Alternativley, examina-

tion of the record in this case reveals dramatic evidence of why the refusal to give the requested instruction violated the Federal Constitution. There was a continuing theme throughout petitioner's trial that he had consistently refused to explain himself to the police and, ultimately, to the jury. In the testimony of the police witnesses, in the statements and argument of both counsel, even in an item of physical evidence (the "waiver form"), reference was repeatedly made to Mr. Carter's "refusal" to answer questions at the time of his arrest and subsequent failure to testify. Furthermore, nothing in the voir dire by the court, arguments of counsel or other instructions given by the court adequately substituted for the requested instruction. Most significantly, the tendered instruction on the burden of proof was rejected. Instructions on other fundamental principles of law were sparse. It can't seriously be suggested that petitioner's reliance upon the Fifth Amendment did not enter the jury's deliberations. It was a principal issue in the trial. Finally, the danger complained of — that the jury will leap to the natural but wrong conclusion regarding the defendant's silence — is graphically illustrated by the record at bar. Contrary to the jury's undoubted assumption, petitioner declined to testify for reasons unrelated to his guilt or innocence. In the context of the totality of the circumstances of petitioner's trial, the refusal to give the requested instruction was violative of petitioner's federal constitutional rights.

Kentucky's rationale for refusing the requested instruction is based upon a belief that the requested instruction offends a statutory bar on comment upon the defendant's failure to testify and probably also upon an expressed preference for sparse instructions to juries. While the second rationale may be of arguable merit as a matter of policy, it is not a sufficient state reason to permit refusal of an otherwise constitutionally required instruction. The first rationale has been recently undermined by this Court. Furthermore, Kentucky's decisions on the issue presented have been inconsistent and the latest Kentucky position results from a misunderstan-

ding of what constitutes prohibited comment on the defendant's failure to testify.

While the degree of approval of a particular instruction among the various jurisdictions does not constitute a "due process acid test," the fact that the vast majority of Kentucky's sister states require an instruction regarding the defendant's failure to testify is strong support for petitioner's position. at least it is relevant, along with the position of scholarly authority, to the always difficult question of what due process requires.

In sum, the result requested here is an inexorable product of two independent constitutional principles as shaped by two separate lines of prior decisions by this Court. In this case, the unrelenting force of the Fifth Amendment privilege against compulsory incrimination and the Due Process Clause of the Fourteenth Amendment merge to require that upon request a state jury be given guidance regarding the defendant's failure to testify. In the absence of such a prophylatic instruction, the citizen's right to decline to testify will be eviscerated. Due to the explicit theme at trial of petitioner's silence, and since petitioner declined to testify for reasons unrelated to guilt, the refusal of the state trial judge to give the requested instruction so infected Mr. Carter's trial that he was denied due process of law.

ARGUMENT

THE STATE TRIAL COURT'S REFUSAL OF PETITIONER'S TIMELY REQUEST TO INSTRUCT THE JURY THAT "THE DEFENDANT IS NOT COMPELLED TO TESTIFY AND THE FACT THAT HE DOES NOT CANNOT BE USED AS AN INFERENCE OF GUILT AND SHOULD NOT PREJUDICE HIM IN ANY WAY," IN LIGHT OF THE FACTS OF THIS CASE, VIOLATED PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST COMPULSORY SELF-INCRIMINATION AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

Introduction

"[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay." *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964). In simple terms, petitioner contends that the Fourteenth Amendment to the United States Constitution requires that the jury in a state criminal trial be informed regarding this "essential mainstay" of our system. The question presented, apparently the last remaining in this particular line of cases, is one which this Court anticipated, and specifically reserved, in *Griffin* v. *California*, 380 U.S. 609, 615 n.6 (1965), and again more recently in *Lakeside* v. *Oregon*, 435 U.S. 333, 337 (1978). It is a question which was resolved favorably to Carter's position by a unanimous Court on non-constitutional grounds over forty years ago. *Bruno* v. *United States*, 308 U.S. 287 (1939).

Petitioner presents here two independent, although overlapping, constitutional analysis in support of the desired result. The first finds its genesis in the Fifth Amendment, the second in the Due Process Clause of the Fourteenth Amendment. The first constitutional theory is supported by the rationale of *Bruno and Wilson* v. *United States*, 149 U.S. 60 (1892). It finds its later development in *Griffin* and recently in

Lakeside. The second thesis also begins with *Bruno* but takes a different track, finding support in various decisions of this Court and culminating in the recent decision in *Taylor* v. *Kentucky*, 436 U.S. 478 (1978). It is petitioner's contention that the result sought may be reached by a synthesis of the two constitutional concerns demonstrated by these distinct lines of authority. The first is the necessity to protect and breathe life into the Fifth Amendment privilege to decline to testify. The second concerns the demonstrated need to enhance the reliability of the jury trial by insuring that the fact-finder is given appropriate guidance regarding the fundamental principles which govern our system.

A. The prejudice inherent in providing no guidance to the jury when the defendant fails to testify constitutes a penalty imposed for exercise of the constitutional privilege and violates the Fifth Amendment.

"The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations . . ." *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 55 (1964), quoting E. GRISWOLD, THE FIFTH AMENDMENT TODAY, 7 (1955). "[I]t is regarded as . . . [a] fundamental part of our constitutional fabric . . ." 378 U.S. at 56 n.5. In *Malloy* v. *Hogan*, 378 U.S. at 9 n.7, this Court again quoted Dean Griswold, *supra* at 73:

> I believe the Fifth Amendment is, and has been through this period of crisis, an expression of the moral striving of the community. It has been a reflection of our common conscience, a symbol of the America which stirs our hears.

In *Bruno* v. *United States*, 308 U.S. at 291, this Court agreed to decide the "important question in the administration of federal criminal justice" now presented in regard to state criminal trials. The petitioner in *Bruno* had requested an

instruction similar to that requested below.[7] *Id.* at 292. Mr. Justice Frankfurter wrote that the "narrow question before us is whether in these circumstances[8] Bruno had the *indefeasible right* . . ." to the "substance" of the instruction. *Id.* (emphasis added). This Court did not reach the Fifth Amendment issue but unanimously decided that a federal statute required that the "substance of the denied request should have been granted . . ." *Id.* at 294. The statute prohibited any presumption from arising from a criminal defendant's failure to testify.[9]

At common law, the defendant could not be compelled to furnish evidence against himself. On the other hand, he was not permitted to testify. *Wilson* v. *United States*, 149 U.S. at 65.[10] "This rule, while affording great protection to the accused against unfounded accusation, in many cases prevented him from explaining [incriminating] circumstances . . . To relieve him from this embarrassment the law was passed . . . he is by the act in question permitted . . . to testify . . ." *Id.* at 65-66. Following the enactment of 18 U.S.C. §3481 (1969), all states followed suit with laws of their own. Although the various statutes differed to some extent, all states permitted

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[7] The instruction was more thorough than Carter's tendered instruction. "The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner." 308 U.S. at 291. While the phraseology of petitioner's requested instruction was more "conservative," it was certainly adequate and constitutionally accurate. *See Taylor* v. *Kentucky*, 436 U.S. at 488 n.16. See, e.g., Appendix C.

[8] The jury had already been instructed: "It is the privilege of a defendant to testify as a witness, if, and only when, he so elects . . ." 308 U.S. at 291.

[9] Act of March 16, 1878, now 18 U.S.C. § 3481 (1969), which states, in pertinent part: "In a trial of all persons . . . [the defendant] shall, at his own request, be a competent witness. His failure to make such a request *shall not create any presumption against him.*" (emphasis added).

[10] 8 J. WIGMORE, EVIDENCE § 2272 at 427 (McNaughton rev. 1961); Comment, 11 N.Y.L.F. 575, 576-577 (1965).

the defendant to testify and most (sometimes in separate statutes) prohibited any "inference" from his failure to do so.[11]

In *Wilson*, the issue before this Court was whether it was error under Section 3481 for the prosecutor to comment in argument on the defendant's failure to testify. This Court unanimously held that it was. "Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled . . ." *Id.* at 66. As in *Bruno*, however, this Court did not need to reach any Fifth Amendment issue. The question of whether adverse comment on the defendant's failure to testify in *state* criminal trials violates the defendant's Fifth and Fourteenth Amendment rights has arisen three times. In the first two cases, this Court assumed without deciding that the Fifth Amendment barred adverse comment by the trial judge and/or counsel so as to reach the larger question of whether the Fifth Amendment privilege was applicable to the states. *Twining* v. *New Jersey*, 211 U.S. 78, 114 (1908); *Adamson* v. *California*, 332 U.S. 46, 50 (1946).[12] In each case, this Court "adhered to the position that the Federal Constitution does not require the States to accord the Fifth Amendment privilege against self-incrimination." *Tehan* v. *Shott*, 382 U.S. 406, 412 (1966).

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[11] Dills, *The Permissibility of Comment on the Defendant's Failure to Testify in His Own Behalf in Criminal Proceedings, 3 WASH.L.REV. 161, 164-165 (1928). "In the United States* almost universal legislation decreed, in varying phraseology, that the inference shall not be availed of." WIGMORE, *supra* n.10. (emphasis in original). In Appendix B, petitioner has compiled relevant statutes from 43 jurisdictions. Most of these statutes (41) contain the "no inference" proviso (or the equivalent) common to Section 3481 and Kentucky's statute.

KRS 421.225, "Testimony of defendant" states: "In any criminal or penal prosecution the defendant on his own request, shall be allowed to testify in his own behalf, but his failure to do so *shall not be commented upon or create any presumption against him.*" (emphasis added).

[12] This Court was never required to reach the first question in the context of a federal criminal trial because the federal "no inference" statute prohibited adverse comment. *Wilson* v. *United States, supra*; *Adamson* v. *California*, 332 U.S. at 50 n.6.

Prior to the third occasion, this Court reexamined the applicability of the Fifth Amendment to the states. In *Malloy* v. *Hogan*, 378 U.S. at 8, this Court overruled *Twining* and *Adamson*:

> The Fourteenth Amendment secures against state invasion of the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the *unfettered exercise of his own will, and to suffer no penalty . . . for such silence.* (emphasis added).

The State of Connecticut argued that "the availability of the federal privilege . . . [should] be determined according to a less stringent standard than is applicable in a federal proceeding." *Id.* at 10. This Court disagreed. "The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down version of the individual guarantees of the Bill of Rights . . .' " *Id.* at 10-11 (citation omitted). "It would be incongruous to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was asserted in a state of federal court." *Id.* at 11.

Shortly after *Malloy*, this Court again considered a case presenting a question involving comment on the defendant's failure to testify. In *Griffin* v. *California*, 380 U.S. at 610, the trial judge informed the jury "that a defendant has a constitutional right not to testify." The jury was also warned that the defendant's failure "does not create a presumption of guilt nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof." However, the instruction additionally permitted the jury to "take that failure into consideration' " The prosecutor "made much of the failure" of Mr. Griffin to testify in his summation. *Id.* This Court granted review in *Griffin* to consider whether "comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment." *Id.* at 611.

The *Griffin* Court noted that *Wilson* prohibited comment of this sort in federal trials, conceding that the decision rested

on the federal statute and not the Fifth Amendment. "But that is the beginning, not the end, of our inquiry." *Id.* at 613. After reviewing the *Wilson* decision, this Court stated, in a crucial passage: "*If the words 'Fifth Amendment' are substituted for 'act' and for 'statute' the spirit of the Self-incrimination Clause is reflected.*" *Id.* at 613-614 (emphasis added). *Griffin* condemned comment on the failure to testify as a remnant of the "inquisitorial system" prohibited by the Fifth Amendment. "It is a penalty imposed by courts for exercising a constitutional privilege. *It cuts down on the privilege by making its assertion costly.*" *Id.* at 614 (emphasis added).

The dissenting justices in *Griffin* disagreed, stating that "the California comment rule is not a coercive device which impairs the right against self-incrimination . . ." *Id.* at 622. Mr. Justice Stewart, jointed by Mr. Justice White, emphasized the protective nature of the California instruction, comparing it with the situation where the jury is "left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt. . . ." *Id.* at 621. The *Griffin* dissent apparently saw more danger in lack of jury guidance regarding the defendant's failure to testify than in reasonable comment upon it. Specifically referring to two Kentucky decisions in a footnote, Mr. Justice Stewart stated:

> . . . whenever in a jury trial a defendant exercises this constitutional right, the members of the jury are bound to draw inferences from his silence. No constitution can prevent the operation of the human mind. Without limiting instructions, the danger exists that the inferences drawn by the jury may be unfairly broad. *Some States have permitted this danger to go unchecked, by forbidding any comment at all upon the defendant's failure to take the witness stand. Id.* at 623 (emphasis added; footnote omitted).

Griffin was implicitly reaffirmend in *Lakeside* v. *Oregon*, *supra*, where the question presented was whether the giving of a "no inference" instruction over defense objection violated

the Constitution. In *Lakeside*, an instruction similar to that requested below was given despite trial counsel's complaint that his strategy was to avoid any mention of the defendant's failure to testify. This Court noted that the argument rested upon "two very doubtful assumptions."

> First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own. Second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on speculative assumptions so dubious as these. *Id.* at 340 (footnotes omitted).

In reaffirming *Griffin*, the *Lakeside* Court held that the Fifth Amendment barred only *adverse* comment on the defendant's failure to testify. A "protective instruction in the defendant's interest" is " 'comment' of an entirely different order. Such an instruction cannot provide the pressure on a defendant found impermissible in Griffin." *Lakeside* v. *Oregon*, 435 U.S. at 342, 339.

Petitioner submits that the natural end product of the precedents discussed is the result sought in this case. The combined effect of *Wilson, Bruno, Malloy, Griffin and Lakeside* leads to the conclusion that the state trial court's refusal to give the requested protective instruction violated the Fifth Amendment privilege against self-incrimination, applicable to Kentucky via the Due Process Clause of the Fourteenth Amendment. There are several compelling reasons why this is so. First, Section 3481 draws it strength from and does not enlarge upon the essence of the Self-Incrimination Clause. Therefore, as the same result was reached in *Wilson* (under the statute) and *Griffin* (under the Fifth Amendment), so the decision in the present case should be consistent with *Bruno*. Similar to what the *Griffin* Court did with the *Wilson* opinion, the words "Fifth Amendment" may be substituted for "Congress" in the Bruno decision. *See Griffin* v. *California*, 380 U.S. at 613-614. The opinion would read:

> The only way [the Fifth Amendment] . . . could provide that abstention from testifying should not tell against an

> accused was by an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts . . . [The Fifth Amendment] could not have meant to legislate against the psychological operation of the jury's mind. It laid down cannons of judicial administration for the trial judge to the extent that his instructions to the jury, certainly when appropriately invoked, might affect the behavior of jurors. *Bruno* v. *United States*, 308 U.S. at 293 (citation omitted).

Holding that the failure to instruct as requested was no "technical error" which did not involve "substantial rights," the *Bruno* Court proclaimed that the issue presented was not "concerned with mere etiquette of trials and with the formalities and minutiae of procedure . . ."[13] *Id.* at 293-294. (Continuing with substitution for the word "Congress"), *Bruno* states: "Of a very different order of importance is the right of an accused to insist on a privilege which [the Fifth Amendment] . . . has given him." *Id.* at 294.

In *Lakeside*, this Court stated that *Malloy* v. *Hogan*, 378 U.S. at 11, "established that 'the same standards' must attach to the privilege 'in either a federal or state proceeding.' " 435 U.S. at 337. Once again, it follows that the decision in the case *sub judice* should be consistent with that in *Bruno*, which was decided on the basis of a statute designed to effectuate the Fifth Amendment privilege.[14] *See also Lakeside* v. *Oregon*, 435, U.S. at 343 n.1 (dissenting opinion, Stevens, J.).

It is extremely important to remember that at the time of the incorporation of the privilege against compulsory self-incrimination into the Bill of Rights, the defendant was not

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[13] It is worthy of note that the jury in *Bruno*, unlike petitioner's jury, had already been informed of the Fifth Amendment privilege. *See* n.8, *supra*. The trial judge had claimed: "I've already covered that." *Id.* at 292.

[14] *See* Note, 40 TULL.L.REV. 409, 416 (1966), where the author acknowledged that *Bruno* was based upon a federal statute but noted "the rationale of the decision seems equally applicable, and probably more compelling, under the fifth amendment."

permitted to testify. "This rule . . . afford[ed] great protection to the accused against unfounded accusation . . ." *Wilson* v. *United States*, 149 U.S. at 65. The prohibition against testimony by defendants, as did the privilege against compulsory self-incrimination, partially grew out of the excesses of the "Star Chamber" where the refusal to testify was tantamount to a confession.[15] When the various jurisdictions began to enact legislation permitting the testimony of the defendant, they met resistance from those who felt that this was a form of compulsory self-incrimination.[16]

> *It was feared that the granting of the capacity to testify standing by itself was self-incrimination.* Thus many states followed or accompanied their capacity statues with statutes forbidding comment on accused's failure to exercise this new right. Note, *Griffin* v. *California*: *Comment on Accused's Failure to Testify Prohibited by the Fifth Amendment*, 70 DICK. L. REV. 98, 100-101 (1965)(footnotes omitted; emphasis supplied).

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[15] The genesis of the Fifth Amendment privilege was in the excesses of the ecclesiastical courts, the Court of High Commission in Causes Ecclesiastical and the Court of Star Chamber. These courts attempted to use the oath *ex officio mero* to destroy heresy. Failure to give completely truthful testimony after the oath was given was punishable by death. "The theory of the Commission, which has been echoed today, was that an innocent man had nothing to hide . . . only the guilty defendant had reason to refuse the oath and could not thereafter claim injustice when convicted as if he had confessed." Gradually, the right against self-incrimination evolved. "In fact, the courts had become so concerned with protecting the right of the accused that the defendant was not permitted to testify on his own behalf. Note, *Prosecutorial Comment and Judicial Instruction on a Defendant's Failure to Testify: In Support of a Liberal Application of the Fifth Amendment*, 13 VAL. U. L. REV. 261, 263-265 (1979). *See Lilburn's Trial*, 3 How. St. Tr. (1637-45); WIGMORE, *supra* n.10, § 2250.

[16] *See State* v. *Cameron*, 40 Vt. 555, 565 (1867). An early critic of the statutes in question wrote, "although they profess to leave it to the accused to become a witness or not, they, in reality, force him to take the stand to protect himself from the inference of guilt which is almost sure to be drawn against him if he fails to do so, and the case calls for an explanation on his part." Maury, *Validity of Statutes Authorizing the Accused to Testify*, 14 AM.L.REB. 753, 762-763 (1880).

It really cannot be suggested that a jury does not notice a defendant's failure to testify. "[T]he jury will, of course, realize this quite evident fact, even though the choice goes unmentioned . . . a fact inescapably impressed on the jury's consciousness." *Griffin* v. *California*, 380 U.S. at 621, 622 (dissenting opinion). This Court made short work of this proposition in *Lakeside* v. *Oregon*, 435 U.S. at 340 n.10. "The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." 8 J. WIGMORE, EVIDENCE §2272 at 426 (McNaughton rev. 1961). Certainly, under the facts of this case the jury could not help but be totally aware of Mr. Carter's failure to take the witness stand. "In some trials, the defendant's silence will be like 'the sun . . . shining with full blaze on the open eye.' " *Lakeside* v. *Oregon*, 435 U.S. at 345 (dissenting opinion), quoting *State* v. *Cleaves*, 59 Me. 298, 301 (1871). In this sense, the same constitutional danger exists as was present in *Griffin*. Indeed, in the absence of any limiting instruction the danger to the Fifth Amendment privilege seems greater. *Griffin* v. *California*, 380 U.S. at 623 (dissenting opinion).

Lakeside also stands for the proposition that a protective instruction on the defendant's right not to testify can be of considerable benefit to a nontestifying defendant. 435 U.S. at 340.[17] Therefore, petitioner submits that a state trial court has an affirmative responsibility, upon proper request, to remove the danger that a jury will give evidentiary weight to the defendant's failure to testify. No adverse inference was possible from exercise of the privilege at the time of its incorporation into the Bill of Rights because the defendant was not permitted, *and therefore not expected*, to testify. A prophylactic instruction is now required to restore the original force of the privilege. Without an appropriate instruction, petitioner submits that the invocation of the privilege, at least in trials such as his own, becomes a meaningless exercise.

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[17] See Section "B" *infra*.

"*Griffin* stands for the proposition that the government may not add unnecessarily to the risk taken by a defendant who stands mute." *Lakeside* v. *Oregon*, 435 U.S. at 345 (dissenting opinion). Similarly, the trial court, by refusing a purging instruction, cannot increase "the pressure on a defendant found impermissible in *Griffin*." *Id.* at 339. If petitioner is to have a "free choice to admit, to deny, or to refuse to answer," *Lisenba* v. *California*, 314 U.S. 291, 241 (1941), and is "to suffer no penalty," *Malloy* v. *Hogan*, 378 U.S. at 8, the jury must be given proper guidance on the issue of the defendant's deafening silence. Untrammeled use by the jury of the natural, but incorrect, inferences from Carter's failure to testify violates the Fifth Amendment because "[u]sing a defendant's silence as evidence against him is one way of having him testify against himself." *Scott* v. *California*, 364 U.S. 471 (1960)(dissenting opinion, Douglas, J.).

Petitioner recognizes, of course, that the Fifth Amendment only prohibits "compelled" self-incrimination. *Cf. Jenkins* v. Anderson, _____ U.S. _____, 100 S.Ct. 2124, 2130 (1980)(concurring opinion, Stevens, J.), discussing prearrest silence. "Compulsion is the focus of the inquiry." *Griffin* v. *California*, 380 U.S. at 620 (dissenting opinion). However, physical torture is not the only type of constitutionally prohibited compulsion. *See e.g., Haynes* v. *Washington*, 373 U.S. 503 (1963). To the same or greater extent than in *Griffin*, the trial court's refusal to put a check on the jury's use of petitioner's silence "cut down on the privilege by making its assertion costly." *Griffin*, 380 U.S. at 614. A trial judge must provide protection for the exercise of the Fifth Amendment privilege even when, unlike the present case, it is improperly permitted to be claimed. *See Johnson* v. *United States,* 318 U.S. 189 (1942). Even pressure of a relatively subtle form can represent unconstitutional compulsion. In *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), a state law[18] required a defendant

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[18] Kentucky was the only other state to have such a statute. KRS 421.225(2) (since repealed).

to testify first if he wished to testify at all. This Court held that, despite the defendant's failure to testify[19], the statute "exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first." As in *Brooks*, "A heavy burden [is cast on petitioner's]. . . . otherwise unconditional right not to take the stand." *Id.* at 610. The trial judge's refusal to lift that "heavy burden" from petitioner was constitutional error.

Accordingly, the state trial court's refusal to give a protective instruction regarding petitioner's Fifth Amendment right against compulsory self-incrimination extracted a substantial penalty for the exercise of the privilege by subjecting Mr. Carter to the real danger that the jury treated petitioner's failure to testify as evidence of guilt. The Fifth Amendment has been violated.

B. The prejudice inherent in refusing guidance to the jury when a criminal defendant declines to testify violates the Due Process Clause of the Fourteenth Amendment.

The protective instruction refused by the trial court below was not merely desirable or "universally" required but it dealt with a "right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973). The Fifth Amendment right is of such a fundamental nature that jury guidance on the privilege is essential to due process of law. The privilege against self-incrimination is not only "deemed desirable from the viewpoint of sound judicial practice . . ." it is actually "commanded by the Constitution." *Cupp* v. *Naughten*, 414 U.S. at 146.

The importance of instructions on the fundamental principles which govern criminal trials cannot be overstated.

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[19] Likewise, petitioner may legitimately claim a violation of the Fifth Amendment privilege despite the fact that he did not actually incriminate himself. *See Brooks* v. *Tennessee*, 406 U.S. at 612 n.6.

Clearly many citizens are woefully lacking in knowledge about the basic principles of our criminal justice system — especially in regard to the accused's right to remain silent and rely upon his presumption of innocence and the prosecutor's burden of proof. "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."[20] *Ullman* v. *United States*, 350 U.S. 422, 426 (1965).

As discussed in Section "A", this Court has recently recognized that lay jurors will benefit from[21] and pay attention to an instruction "not to draw any adverse inference from . . . [the defendant's] decision not to testify." *Lakeside* v. *Oregon*, 435 U.S. at 334, 340. Similarly, in *Bruno* v. *United States*, 308 U.S. at 294, the "no inference" instruction was deemed "legally significant" and not "psychologically futile."

> Certainly, despite the vast accumulation of psychological data, we have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause "shall not create any presumption against him." *Id.*

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[20] A recent comprehensive national survey of public opinion conducted for the National Center for State Courts revealed the startling information that 37% of those interviewed believe that it is the accused's responsibility to prove his innocence. 64 ABAJ 653 (1978). Furthermore, when the interviewees were broke down by income groups, it was revealed that more than 50% of those with incomes under $10,000 believe that a defendant has the burden of proving his innocence. THE PUBLIC IMAGE OF COURTS (Reprinted from State Courts: A Blueprint for the Future) 10 (1978). "Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." *Ullman* v. *United States*, 350 U.S. at 426427.

[21] Even a criminal defendant who has the advice of knowledgeable counsel and may have prior experience with the law must be informed on the record of his Fifth Amendment privilege by the trial judge. *Boykin* v. *Alabama*, 395 U.S. 238 (1969)

Research in the social sciences supports this Court's conclusion that "instructing a jury in the basic constitutional principles that govern the administration of criminal justice" is effective.[22]. *Lakeside* v. *Oregon*, 435 U.S. at 342. Our system is based upon the belief that jurors understand and follow the court's instructions on the law. "In a trial by jury . . . the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia* v. *United States*, 289 U.S. 466, 469 (1932), quoting *Herron* v. *Southern P. Co.*, 283 U.S. 91, 95 (1930). "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Starr* v. *United States*, 153 U.S. 614, 626 (1893).

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[22] *See Reed, Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decisionmaking*, 71 J.CRIM.L. & CRIMINOLOGY 68 (1980). In the experiement reported by Reed subjects were divided into two groups, one group received instructions while the other did not. Both read summaries of trials. *Id.* at 69-70. Instructions "had a significant effect . . . Jurors were affected by judges' instructions." *Id.* at 71.

Another study provided evidence that individual jurors and juries as a whole retain and comprehend judges' instructions at a rather high level — much higher than many people in the legal field had anticipated. Forston, *Judge's Instructions: A Quantitative Analysis Analysis of Jurors' Listening Comprehension*, 18 TODAY'S SPEECH 34 (1970). Actual jurors have reported impressive understanding of the court's instructions. Bridgeman and Marlowe, 64 J. APPLIED PSYCH. 91, 97 (1979). Eighty-two percent of the jurors interviewed "said they either completely or mostly understood the judge's instructions to the jury when the trial ended."

Particularly significant to petitioner's case is an experiment which demonstrated that jurors "do take account of a judicial instruction to disregard similar convictions." Cornish & Sealy, *Juries and the Rules of Evidence*, 1973 CRIM.L.REV. 208, 217-218, 222. Jurors could thus be expected to follow an instruction to disregard the defendant's failure to testify.

See also R. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 68 (1980), and Gerbosi, Zuckerman, and Reis, *Justice Needs a New Blindfold: A Review of Mock Jury Research*, 84 PSYCH. BULL. 323 (1977) for additional support for the proposition that jurors do heed the court's instructions.

In *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1945), Mr. Justice Frankfurter wrote for the Court:

> Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.

Proper jury guidance as to fundamental legal principles is essential to the integrity of the fact-finding function. It goes to the heart of the Sixth Amendment right to a jury trial applicable through the Due Process Clause of the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). "It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court." *Herron* v. *Southern P. Co.*, 283 U.S. at 95. ' "Trial by jury' . . . is not merely a trial by a jury of twelve men . . . it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law . . ." *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-14 (1899).

In determining whether a particular procedure offends the Due Process Clause, this Court has traditionally analyzed various factors to determine whether there has been a violation of "fundamental fairness." The "history" of the protection afforded the defendant regarding compulsory self-incrimination is relevant because it is "fundamental to our system of justice." *Duncan* v. *Louisiana*, 391 U.s. at 153-154. *See also Mullaney* v. *Wilbur*, 421 U.S. 684, 692-696 (1975); *In Re Winship*, 397 U.S. 358, 361 (1970). Also of relevance is the extent of "adherence" to the practice in "common law jurisdictions" including the practice of the states and federal courts. *See, e.g., Sandstrom* v. *Montana*, 442 U.S. 510, 514 n.3 (1979). The widespread insistence upon giving the requested instruction in federal (*Bruno*) and state courts is helpful in analyzing the due process nature of petitioner's claim.[23] The history and widespread use of the prophylactic

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[23] See Section "E", *infra*.

instruction in issue reflects "a profound judgment about the way in which . . . justice [should be] administered." *Duncan* v. *Louisiana*, 391 U.S. at 155.

In *Lakeside*, this Court captured the essence of petitioner's "due process" argument:

> The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood such as reasonable doubt and burden of proof. *To instruct them in the meaning of the privilege against compulsory self-incrimination is no different. Id.* at 340 (emphasis added).

In *Taylor* v. *Kentucky, supra*, this Court was asked to decide whether the Due Process Clause required that instructions be given on the presumption of innocence and the lack of evidentiary value of the indictment. Due process was found to require an instruction on the presumption of innocence because of the "salutary effect upon lay jurors. . . . [T]he ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence." *Id.* at 484. Special emphasis was placed on the "purging" effect of the presumption of innocence instruction and the need to protect" . . . the accused's constitutional right to be judged solely on the basis of proof aduced at trial." *Id.* at 486. The same value can be attributed to the instruction that the jury should not consider a defendant's failure to testify. The average juror needs to be educated regarding this essential but unappreciated right. Second, the tendered instruction would have performed an important "purging" function by removing the issue of Mr. Carter's silence before and at trial.[24] Finally, it must be remembered that the protective instruction requested was designed to inform the jury of a *specific constitutional right*. In this sense, petitioner's claim that the Due Process Clause of the Fourteenth Amendment requires such an in-

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[24] See Section "C" *infra*.

struction is even more compelling than the similar claim in *Taylor*, where the dissenting opinion noted:

> *In this case the omission did not violate a specific constitutional guarantee, such as the privilege against compulsory self-incrimination. Id.* at 492 (dissenting opinion, Stevens, J.; emphasis added; footnote omitted).

Petitioner submits that it is a denial of due process of law in violation of the Fourteenth Amendment for a state court to deny a timely request for a protective instruction on the Fifth Amendment privilege when the defendant declines to testify. Further, petitioner suggests that the denial of due process is so fundamental that inquiry into the particular facts in the present case is unnecessary. *See Bruno* v. *United States*, 308 U.S. 293-294; *Bollenbach* v. *United States*, 326 U.S. at 614-615. Alternatively, an examination of the trial below will reveal why the requested instruction was essential and its refusal violative of the Fourteenth Amendment.

C. Refusal of the instruction protective of Mr. Carter's exercise of his Fifth Amendment privilege created an unacceptable risk that the jury improperly considered his failure to testify as evidence of his guilt and so infected his trial as to deny him due process of law.

A defendant's silence during trial, like his silence during custodial interrogation, is always "insolubly ambiguous" as it relates to guilt or innocence. *Doyle* v. *Ohio*. 426 U.S. 610, 617 (1976). Indeed a prime rationale of the Fifth Amdnement privilege is that a particular defendant may have reasons unrelated to his guilt or innocence for declining to testify.[25] This fact was recognized in this Court's decisions in *Wilson* v. *United States*, 149 U.S. at 66, and *Griffin* v. *California*, 380 U.S. at 613:

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him.

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[25] See discussion *supra* n.15. *See Lakeside* v. *Oregon*, 435 U.S. at 343 (dissenting opinion).

> Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudice against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand.

Other "neutral" reasons why defendants might decline to testify are fear of impeachment by prior felony convictions or other damaging information not necessarily relevant to the charge being tried, *Griffin*, 380 U.S. at 615; hesitancy to "incriminate others who they either love or fear," *Lakeside* v. *Oregon*, 435 U.S. at 344 n.2; or poor appearance, obnoxious personality, lack of intelligence, tenuous emotional situation, or a different cultural background from the jury, etc., causing an inability to communicate effectively to the jury or otherwise leaving a poor impression.[26] *Id.* at 343.

The present case presents an excellent example of how the usual juror conclusion from the failure to testify can be inaccurate. Contrary to the jury's undoubted assumption, petitioner declined to testify due to a reason unrelated to guilt or innocence. Defense counsel made it clear that "the only reservation Mr. Carter might have about testifying would be his impeachment by the use of these previous offenses . . ." [A, 54]. It was only when the trial court ruled that petitioner could be impeached by the use of the *same prior felony convictions in issue during the recidivist portion of the trial* that petitioner told the trial judge he would not testify [A, 58].[27]

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[26] *See* Note, 62 MARQ. L. REV. 74, 81, 85-86 (1978): Note, 70 DICK.L.REV. *supra* at 116-117.

[27] Kentucky's procedure regarding impeachment by use of prior felony convictions is governed by *Cotton* v. *Commonwealth*, 454 S.W.2d 698 (Ky. 1970). A hearing must be held outside the presence of the jury to determine if the prior felony convictions are relevant to credibility, i.e., those that involve "dishonesty, stealing, and false swearing." *Id.* at 701. Discretion is vested in the trial judge who must consider various factors — ". . . prejudice to the witness — remoteness of prior conviction . . . type of crime . . . age and circumstances of defendant . . ." *Id.* at 701-702.

The effect of Judge White's ruling was to force petitioner to choose between not testifying in the first phase of his trial or testifying and being required to admit the prior convictions in issue in the recidivist phase.[28] This was a difficult choice indeed, for conviction as a first degree persistent felon carriers a *mandatory* ten year minimum sentence before parole eligibility.[29] Petitioner had good reason, apart from the question of

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The transcript does not reflect the exact number of "qualified" prior felonies on petitioner's record. However, it is quite clear that there were various convictions to choose from other than those listed in the persistent felon indictment [A, 57]. The trial judge declined to exercise his discretion and order the prosecutor not to impeach Carter with those prior convictions to be in issue in the event of a guilty verdict on the burglary charge [A, 58].

[28] Under Kentucky law, admission to prior felony convictions which form the basis of the persistent felon indictment is tantamount to a guilty plea to the recidivist charge. Kentucky employs a bifurcated procedure. KRS 532.080(1), *supra* n.2, permits "the court for good cause [to] discharge the [first phase] jury and impanel a new jury" for the enhancement trial. However, in *Brown* v. *Commonwealth*, 551 S.W.2d 557, 559-560 (ky. 1977), the Supreme Court of Kentucky refused to permit impanelling of a second jury as a matter of federal constitutional law or statutory discretion. "If [the defendant] elects to testify, what he says can be used against him in the second state . . ." *Id.* at 560. *Brown* was reaffirmed by the Court in the present case as the same issue was presented [A, 78-79].

[29] KRS 532.080(7), *supra* n.2. This mandatory ten year term before parole eligibility is the longest sentence of its kind in Kentucky. Even a convicted murderer is eligible after six years imprisonment. 501 K.A.R. 1:010 (1975). Because of this possibility and the trial court's rejection of the protective instruction, petitioner was, as his counsel stated for the record, ". . . between a rock and a hard place . . ." [A, 48].

Moreover, even in the absence of the more difficult situation faced by petitioner, criminal defendants generally may reasonably decline to testify based solely on fear of impeachment by prior felony convictions. In H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 145-147 (1966), the authors detail the results of the study of the American jury system undertaken at the University of Chicago Law School. The defendant had a criminal record in 47% of the cases examined. *Id.* at 145. "[R]ecord is an important determinant of the defendant's decision to testify. If he has no record, he will elect not to testify in only . . . 9 percent of the cases; if he has a record this percentage rises to . . . 26 percent. Further, when the evidence is most favorable to the defendant . . . the defendant without a record testifies over 90 percent of the time . . . [W]hen the defendant has

guilt or innocence, to decline to testify.[10]

On the other hand, it is clear that the jury was fully aware that petitioner failed to testify and it is reasonable to conclude that the jury used this failure as evidence of guilt. Mr. Carter's refusal to explain himself to the police when apprehended under incriminating circumstances and failure to testify at trial was a consistent theme in the trial court. Petitioner's apparent "refusal" to offer any explanation, when an explanation could have been forthcoming, was not merely an undercurrent in the flow of the evidence, it was one of the principal issues at trial. Defense counsel's opening statement all but assured the jury that petitioner would testify. "I sup-

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a record . . . he elects to testify only 53 percent of the time, suggesting that here counsel sees no reason to disturb a favorable situation by the disclosure of the record." *Id.* at 146.

Admission of evidence of prior felony convictions to impeach a criminal defendant's credibility has been held to impose an unreasonable burden on his right to testify and, consequently, to be a denial of due process of law. *State* v. *Santiago*, 53 Haw. 254, 492 P.2d 657 (1971). Other courts have severely restricted this type of impeachment. *See, e.g., State* v. *McAboy*, 236 S,E.2d 431 (W.Va. 1977).

Even among authorities advocating the propriety of comment upon the defendant's failure to testify, it has been suggested that use of prior felonies to impeach the defendant should be prohibited. Note, *Comment on Defendant's Failure to Take the Stand*, 57 YALE L. J. 145, 152 (1947). *See* UNIFORM RULE OF EVIDENCE 23(4) (1953), allowing comment and UNIFORM RULE 21, prohibiting impeachment by prior convictions unless the defendant puts his character in issue.

[10] Although petitioner was convicted by the jury in the persistent felon trial below, conviction as a recidivist under Kentucky procedure is not a foregone conclusion. In essence, the persistent felon hearing is a "mini-trial" in which fundamental constitutional rights apply. *See Specht* v. *Patterson*, 386 U.S. 605, 609, 610 (1967). The Commonwealth is held to an exacting standard of proof of each element of the offense beyond a reasonable doubt. Convictions have been vacated for failure to prove a single element. *See, e.g., Adams* v. *Commonwealth*, 551 S.W.2d 561, 563-564 (Ky. 1977); *Crawley* v. *Kunzman*, 585 S.W.2d 387 (Ky. 1979). Kentucky also has a history of "jury nullification" in recidivist proceedings. "As disclosed in many decisions it has not been unusual for juries to disregard former convictions." *Coleman* v. *Commonwealth*, 276 Ky. 802, 125 S.W.2d 728, 729 (1939).

pose that most of you would issue a true bill if Mr. Ruff told you what he has just told you *and you didn't have a chance to hear what the defendant had to say for himself.*" [A, 16; emphasis added]. The principal witnesses at trial were police officers and both testified that petitioner refused to respond to police interrogation [A, 24, 42]. The "Miranda" waiver form was introduced into evidence with "Suspect refused to answer questions" written on it [A, 72; emphasis added.] Defense counsel began his closing argument ". . . I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify?" [A, 60]. The Commonwealth Attorney made numerous references to the evidence as "uncontradicted" and made various other comments alluding to petitioner's failure to testify[31] [A, 68].

This Court has stated that a claimed constitutional violation in the instructions must be examined in the contex of the entire trial. *Cupp* v. *Naughten,* 414 U.S. at 147. The totality of the circumstances detailed above demonstrates a compelling need for a "purging" instruction regarding petitioner's failure to testify because there was a "genuine danger that the jury would convict petitioner on the basis of . . . extraneous considerations, rather than on the evidence introduced at trial." *Taylor* v. *Kentucky*, 436 U.S. at 488. In this case "[t]he well-recognized and long-established function of the trial judge to assist the jury by . . . instructions" required that he act to

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[31] When a prosecutor refers to the state's evidence as "uncontradicted" and the defendant is the only person who could have contradicted it, courts generally conclude that the comment is an improper reference to the defendant's failure to testify. Annot., 14 A.L.R.3d 723, 730 (1967). One federal circuit court of appeals has held that such comment so clearly focuses the jury's attention on the defendant's failure to testify that it constitutes *per se* reversible error unless the judge interrupts, admonishes the jury and tells them that the prosecutor was guilty of misconduct. *United States* v. *Flannery*, 451 F.2d 880, 881-882 (1st Cir. 1971). Significantly, a "no inference" instruction can help to purge the prejudicial impact of implicit comments on the defendant's not testifying. *See, e.g., United States* v. *Warner*, 428 F.2d 730, 740 (8th Cir. 1970); *United States* v. *Ward*, 481 F.2d 185, 187-188 (5th Cir. 1973). *See* also Note, 70 DICK.L.REV. *supra* at 119-120.

prevent the jury from focusing on petitioner's failure to testify instead of upon the evidence. The trial court's failure to act upon timely request denied petitioner due process of law.

Of course, the claimed constitutional violation "must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. at 147. Although the jury was instructed that "[t]he law presumes a defendant to be innocent of a crime . . ." [A, 8], it is doubtful that this terse directive had any significant impact upon the issue of Mr. Carter's failure to testify. In fact, consideration by the jurors of a defendant's failure to testify tends to strip away the presumption of innocence from a defendant. *Wilson* v. *United States*, 149 U.S. at 66. In *People* v. *Britt*, 43 N.Y.2d 111, 371 N.E.2d 504, 506 (1977), the court emphasized that the failure to give a "no inference" instruction would undermine the presumption of innocence since "by drawing adverse inferences from a defendant's silence, a juror tears from him the presumption which the law has fashioned to serve as his shield." Similarly, West Virginia's Supreme Court has also recognized the close relationship between the right against compulsory self-incrimination and the presumption of innocence. *State* v. *McClure*, 253 S.E.2d 555, 557 (W.Va. 1979), citing Taylor in reaffiriming the importance of a "no inference" instruction.

The trial court's instructions do not mention that the prosecution bears the burden of proof. Instead, the jurors are instructed that they ". . . will find the defendant guilty if, and only if, [they] believe from the evidence beyond a reasonable doubt all of the following . . ." elements [A, 7]. The court refused to give petitioner's tendered instruction on the burden of proof which emphasized that the burden "aways rests upon the prosecution" and that petitioner was "under no obligation to prove anything" [A, 5]. There is no doubt that the Fifth Amendment privilege, the presumption of innocence, and the burden of proof are closely aligned. The right against compulsory self-incrimination ". . . is an expression of our conviction that the defendant in a criminal case must be presum-

ed innocent, and that the State has the burden of proving guilt . . ." *Lefkowitz* v. *Cunningham*, 431 U.s. 801, 810 (1977)(dissenting opinion, Stevens, J.; footnote omitted). However, to say that these principles are closely aligned is not to say that they do not serve distinctive functions. Petitioner's jury would have certainly derived "significant additional guidance" from an instruction that "no inference" should be drawn from his failure to testify. *Taylor* v. *Kentucky*, 436 U.S. at 484. The trial court's presumption of innocence instruction was "skeletal", *id.* at 486, and it is doubtful the jurors were adequately instructed on the burden of proof. Permitting to go unchecked the jury's consideration of petitioner's apparent "refusal" to testify likely led to the undermining of the presumption of innocence and the burden of proof, rather than the trial court's "Spartan instructions" performing any substitute purging effect.[32]

Of course, the beyond-reasonable-doubt standard is also an essential part of due process. *In Re Winship*, 397 U.S. at 363-364. In *Taylor*, however, Kentucky's reasonable doubt instruction was criticized as "truncated . . . [and] hardly a model of clarity." 436 U.S. at 486. Since that time, the instruction has neither been expanded nor clarified. The term "reasonable doubt" is no longer defined. KY. REV. STAT., R. CRIM. PROC. 9.56(2). Petitioner's jury was instructed to "find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty" [A, 8]. In the absence of an instruction informing the jury, in substance, that petitioner's failure to testify "is not evidence of his guilt," the reasonable doubt instruction most certainly did not accomplish removal of the danager complained of. Again, it

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[32] In contrast, petitioner's tendered but rejected burden of proof instruction may have performed a protective role, had it been given, especially as to the emphasis on the continuing burden of the prosecution and the absence of any burden on petitioner "to prove anything" [A, 5].

is more likely that the jury's consideration of Mr. Carter's failure to testify undermined the reasonable doubt standard by permitting consideration of ". . . other circumstances not adduced as proof at trial." *Taylor* v. *Kentucky*, 436 U.S. at 485, citing *Estelle* v. *Williams*, 425 U.S. 501 (1976). Since the Due Process Clause requires courts to "be alert to factors that may undermine the fairness of the fact-finding process" and to "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt," petitioner has been denied a fair trial. 425 U.S. at 503.

Additionally, even had the trial court given the jury "healthy" instructions on the presumption of innocence, burden of proof and reasonable doubt, the tendered prophylactic instruction on petitioner's failure to testify was still necessary. In *United States* v. *Bain*, 596 F.2d 120 (5th Cir. 1979), the issue was whether a "no inference" instruction, very similar to that requested below, should have been given. An extensive burden of proof/reasonable doubt instruction was used. Relying on *Taylor*, the Fifth Circuit noted that ". . . the requested charge gives the jury additional guidance to which the defendant is entitled." 596 F.2d at 122. In the present case, there was a "special purpose" and a "particular need for" the requested instruction. *Taylor* v. *Kentucky*, 436 U.S. at 488.

Furthermore, there was nothing in the voir dire of the court which could have substituted for the requested charge.[11]

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[11] In Kentucky a defendant has no right to inquire of prospective jurors during voir dire about their adherence to the Fifth Amendment privilege. *Wilson* v. *Commonwealth*, 601 S.W.2d 280, 283 (Ky. 1980)(issue rejected *sub silentio*, see Brief for Appellant at 22-23). It has been hled in federal court that inquiry on voir dire about the effect on the jurors of the defendant's failure to testify was unnecessary because the trial court elicited that the jurors would follow the instructions and subsequently gave them a "no inference" instruction. *United States* v. *Goodwin*, 470 F.2d 893, 897 (5th Cir. 1973). However, in Kentucky a defendant has a right to neither voir dire nor an instruction on the privilege . . .

Nor did counsel's argument have any purging effect.[14] In the absence of support from the trial judge, defense counsel's argument, that petitioner "doesn't have to take the stand . . . doesn't have to do anything" [A, 60], likely was rejected as inaccurate and possibly dismissed as arrogance. "[A]rguments of counsel cannot substitute for instructions by the Court." *Taylor* v. *Kentucky*, 436 U.S. at 489.

In sum, neither the instructions as a whole nor the voir dire nor final argument by counsel filled the void created by the refusal of the protective charge on petitioner's right not to testify. *Compare Henderson* v. *Kibbe*, 431 U.s. 145, 153 (1977); *see Cupp* v. *Naughten*, 414 U.S. at 142-143, 147-148, 149, where "twice, explicit instructions [were given] affirming the presumption of innocence and declaring the obligation of the State to prove guilt beyond a reasonable doubt . . . [T]he State's burden of proof was emphasized and re-emphasized . . . Furthermore . . . the instructions freed respondent from any undue pressure to take the witness stand himslef . . ." Indeed, in *Cool* v. *United States*, 409 U.s. 100, 104 (1972), a constitutional violation was found in an instruction because it "substantially reduce[d] the Government's burden of proof." However, the "trial judge repeatedly emphasized to the jury that the Government was obligated to prove guilt beyond a reasonable doubt." *Id.* at 106 (dissenting opinion, Rehnquist, J.). In the present case, the paucity of guidance for the juror on crucial issues is striking. A review of the other "components of the trial" below clearly demonstrates that the

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[14] Despite defense counsel's argument to the jury below, it is the law of Kentucky that no one may "comment" upon the defendant's failure to testify, including defense counsel, even in an attempt "to explain why . . . [his client] had not taken the stand . . ." *Collins* v. *Commonwealth*, 396 S.W.2d 318, 319-320 (1965).

It is also noteworthy that the Supreme Court of Kentucky, in Carter's appeal, stated: "The comments of the appellant's attorney were an invitation to attack, which [the prosecutor] did" [A, 78]. It is fairly clear that defense counsel cannot adequately deal with the problem of the inference from his client's failure to testify in Kentucky without assistance from the trial court.

"testimony of witnesses, arguments of counsel, receipt of [the] exhibits[s] in evidence, and instruction of the jury by the judge" magnified rather than minimized the prejudice inflicted on Lonnie Joe Carter by the refusal of the protective instruction regarding his Fifth Amendment privilege. The refusal to so instruct the jury "so infected the entire trial that . . . [petitioner's] conviction violates due process." *Cupp* v. *Naughten*, 414 U.S. at 147.

D. The decision below conflicts with *Lakeside* v. *Oregon*, *Taylor* v. *Kentucky*, and previous decisions of the Kentucky Supreme Court and is not based on any substantial state interest.

Kentucky's Supreme Court rejected petitioner's claim that he was entitled to a "no inference" instruction on the basis of *Green* v. *Commonwealth*, Ky., 488 S.W.2d 339, 341-342 (1972). The Kentucky court has considered this issue on many occasions with varying results. The earliest decision on the topic is *Tines* v. *Commonwealth*, 25 Ky.L.Rep. 1233, 77 S.W. 363 (1903). In *Tines* the court condemned an instruction to the jury that it should not comment upon or draw any presumption of guilt from the defendant's failure to testify. *Id.* at 364. Remarking that the instruction directed the jury's attention to the defendant's failure to testify and was equivalent to a remark by the prosecutor, Kentucky's highest court required "absolute silence" on the failure to testify. *Id.*

The next few decisions on point adhered to the principle espoused in *Tines*. *Armstrong* v. *Commonwealth*, 190 Ky. 217, 227 S.W. 162, 163-164 (1921); *Hanks* v. *Commonwealth*, 248 Ky. 203, 58 S.W.2d 394, 395 (1933); *Roberson* v. *Commonwealth*, 274 Ky. 49, 118 S.W.2d 157, 158 (1938). However, in *Kelley* v. *Commonwealth*, 300 Ky. 136, 187 S.W.2d 796, 800 (1945), the court held that "it would have been better" for the trial court to have given the "no inference" instruction requested by the defendant but found that the omission was not prejudicial in that case. The court

reiterated that holding of *Kelly* in *Hooper* v. *Commonwealth*, 371 S.W.2d 646, 648 (1963) but concluded that a *sua sponte* instruction was unnecessary. All these cases were decided under statutes virtually identical to KRS 421.225.

The issue was again addressed in *Spencer* v. *Commonwealth*, 467 S.W.2d 128, 131 (ky. 1971). Kentucky's highest court, citing *Kelly* v. *Commonwealth* and *Spencer* v. *Commonwealth*, both *supra*, construed KRS 421.225 as requiring, upon proper request, a "no inference" instruction:

> Although our Kentucky Constitution does not specifically safeguard to the defendant an instruction on his failure to testify, we are of the opinion that in view of KRS 421.225(1) the defendant is entitled to an instruction when properly requested. *Id.* at 131.

However, relying on *Hopper* v. *Commonwealth*, *supra*, the court held that a *sua sponte* instruction was not required.

Subsequently, the Kentucky court again changed its position. It repudiated the language in *Spencer* v. *Commonwealth*, *supra*, as mere dictum. *Scott* v. *Commonwealth*, 495 S.W.2d 800, 802 (Ky. 1973). The court's reasoning was explained in *Green* v. *Commonwealth*,[35] *supra* at 341:

> . . . the requested "no inference" instruction . . . would have been direct "comment" by the court and would have emphasized the fact that the accused had not testified in his own behalf.

The court stated further that a "no inference" instruction "would do violence to the clear intent of our legislature to fully protect the rights of an accused standing as a defendant on trial." *Id.* at 341342.

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[35] In *Green*, the court distinguished *Bruno* v. *United States*, *supra*, because the federal statute does not contain the "no comment" provision included in KRS 421.225. As petitioner will explain in Section "E", the great majority of the twentythree states with statutes containing a "no comment" clause require, explicitly or implicitly, a "no inference" instruction on request. That is so because "no comment" means "no *adverse* comment."

Obviously, the Kentucky Supreme Court has vacillated on the question of a defendant's right to a "no inference" instruction. It is significant that at all times the statute in effect was virtually identical. In its very early and most recent decisions the court reasoned that any mention by the trial court of the defendant's failure to testify equalled adverse comment. Contrastingly, the court apparently concluded that the instruction effectively implemented the statute prohibiting the failure to testify from creating any presumption against a defendant in *Kelly* v. *Commonwealth*, *Hooper* v. *Commonwealth* and *Spencer* v. *Commonwealth*, all *supra*.

The rationale that a "no inference" instruction equals adverse comment on the defendant's failure to testify was specifically rejected by this Court in *Lakeside* v. *Oregon*, *supra*. In *Lakeside*, this Court spoke of the purpose of the requested protective instruction.

> . . . its very purpose is to remove from the jury's deliberations any influence of unspoken adverse inferences. It would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect. *Id.*, 435 U.S. at 339.

Petitioner submits that the position of the Kentucky Supreme Court is based upon what this Court called two "very doubtful . . . speculative . . . [and] dubious . . ." assumptions-that jurors will not notice that a defendant does not testify and that they will ignore the court's "no inference" instruction. *Id.*, 435 U.S. at 340. *See* also *Bruno* v. *United States*, 308 U.S. at 294, where this Court refused to accept the proposition that jurors would not heed the court's instructions. The rationale behind the decision of Kentucky's court in petitioner's case is thus in direct conflict with this Court's holding in *Lakeside*.

Kentucky has articulated only a single state interest in refusing a requested "no inference" instruction — protection of the defendant who has declined to testify. That concern is obviously misplaced as this Court has explained in *Lakeside*.

However, another state policy — a preference for sparse instructions to juries — is no doubt also involved in the court's refusal of the prophylactic instruction. "From time immemorial the emphasis with regard to jury instructions in this state has been placed on simplicity." *Whorton* v. *Commonwealth*, 570 S.W.2d 627, 631 (Ky. 1978), *rev'd per curiam*, 441 U.S. 786 (1976). Referring to this Court's observation in *Taylor* v. *Kentucky*, 436 U.S. at 486, that the trial court's instructions were "skeletal" and "Spartan," Kentucky's highest court said that description "was more of a compliment than a slur" and emphasized that instructions ought to provide "only the bare bones." *Whorton* v. *Commonwealth* 570 S.W.2d at 632.

While there may be merit to Kentucky's position that instructions should be as few and as simple as possible, such a state interest certainly is not substantial enough to override petitioner's interest in the prophylactic instruction he requested to effectuate his Fifth Amendment privilege. This Court recognized, at least implicitly, that the balance between a state's wish to limit its instructions and a defendant's request for a protective instruction must tip in favor of the defendant's constitutional rights in *Taylor* when it held that Taylor was denied due process by the trial court's failure to instruct on the presumption of innocence. Kentucky's decision in petitioner's case is, therefore, in conflict with *Taylor*.

Petitioner notes that when a penalty on the Fifth Amendment privilege is involved this Court has held that even a substantial state interest must be subordinated to the defendant's right to remain silent. In *Brooks* v. *Tennessee*, 406 U.S. at 611, the state's important interest in preventing a defendant from coloring his testimony to conform to what other witnesses have said previously had to give way to the defendant's intelligent exercise of his Fifth Amendment privilege. "Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty." *Id.* Likewise, omitting a prophylactic instruction on the defen-

dant's invocation of his Fifth Amendment privilege is not a "constitutionally permissible means" of effectuating any state interest in "bare bones" instructions.

Finally, petitioner notes that Kentucky's interest in precluding a non-testifying defendant from having a "no inference" instruction given to the jury is not substantial because even Kentucky's highest court has taken various positions on whether the instruction is necessary. Thus there obviously is no compelling state policy involved here.

The conflict of the Kentucky court's decision in petitioner's case with *Lakeside*, *Taylor* and its own previous decisions and the absence of any substantial state interest in precluding a requested "no inference" instruction strongly indicates that petitioner's conviction should be reversed.

E. The vast majority of other authorities support the need for the protective instruction requested and this is persuasive on the federal constitutional question presented.

It is unquestionably helpful to review the policies of the various states and the writings of legal scholars on the question of a non-testifying defendant's right to a "no inference" instruction in determining what the federal constitutional right to due process requires. Significantly, this Court has endorsed surveying the views of the states on a particular topic to assist in fleshing out the mandates of the Due Process Clause. *In Re Winship*, 397 U.S. at 374. *See* also *Mullaney* v. *Wilbur*, 421 U.S. at 696, 701. The nearly universal acceptance of a rule of law by the states certainly establishes its value to a defendant. *Beck* v. *Alabama*, _____ U.S. _____, 100 S.Ct. 2382, 2388-2389 (1980).

Furthermore, in the landmark case on comment regarding a defendant's failure to testify, *Griffin* v. *California*, 380 U.S. at 611 n.3, this Court noted that "the overwhelming consensus of the States, however, is opposed to allowing comment on the defendant's failure to testify." Carter thus submits

that if most states require that the jury be instructed on defense request that the defendant has the right not to testify and that they can draw no inference against him for his failure to testify, it is reasonable to conclude that such an instruction is essential to a fair trial.

Significantly, the overwhelming majority of states regard the "no inference" instruction as a basic protection for the defendant who chooses to exercise his Fifth Amendment privilege. More than forty states have statutes which preclude a defendant's failure to testify from being used against him.[36] Kentucky's statute (KRS 421.225) which provides that a defendant's failure to testify "shall not . . . create any presumption against him" is typical. Furthermore, over half of those states specifically prohibit by statute or rule comment on the absence of testimony by the defendant.[37] Once again, KRS 421.225, stating that a defendant's failure to testify "shall not be commented upon" is typical. And seven states have included in their laws a specific requirement that the trial court instruct the jurors that theymay not draw unfavorable inferences from a defendant's not testifying.[38] For example, CONN.GEN.STAT.ANN. §54-84 (West 1958) provides that "the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify" unless the defendant objects.

Most striking is the fact that forty-one of the forty-six jurisdictions surveyed[39] require, explicitly or at least implicitly, a "no inference" instruction.[40] Of the five states which pro-

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[36] See Appendix B.

[37] See Appendix B.+

[38] See Appendix A-I and Appendix B.++

[39] No case, statute or pattern instruction on the necessity for a "no inference" instruction was located for Alaska, Delaware, Montana or Rhode Island, Petitioner asserts that this void most likely indicates that the instruction is routinely given on request in those states. If it were not, defendants would almost certainly have litigated the issue.

[40] See Appendix A-I and Appendix A-II.

hibit the instruction,[41] Kentucky, Minnesota, Oklahoma and Wyoming apparently reason that the instruction constitutes adverse comment which is harmful to the defendant.[42] Of course, this Court rejected that reasoning in *Lakeside* v. *Oregon*, 435 U.S. at 338-339. Nevada is unique in prohibiting by statute a "no inference" instruction but requiring an instruction that a defendant cannot be compelled to testify. NEV.REV.STAT. §175.181(1)(1979). Thus the handful of states that still preclude a "no inference" instruction have failed to articulate any persuasive rationale for their decisions.

There has been a definite trend over the years toward approval by the states of the "no inference" instruction. A striking recent example is Connecticut. In 1976 the Connecticut Supreme Court strongly condemned the prophylactic instruction in *State* v. *Branham*, 171 Conn. 12, 368 A.2d 63, 64-65 (1976). The court stated that silence on the topic of absence of the defendant's testimony was all that was required. *Id.* It further held that a "no inference" instruction was *too favorable to the defendant* and would permit him to use the Fifth Amendment "shield" as a "weapon". The next year the Connecticut legislature amended CONN.GEN.STAT.ANN. §54-84 (West 1958) by adding §54-84(b) which requires that, unless the accused requests otherwise, the court must inform the jury that it may draw no unfavorable inferences from a defendant's failure to testify.

Georgia, Ohio and Missouri are other examples of this trend. In *Linder* v. *State*, 132 Ga.App. 624, 208 S.E.2d 630 (1974), the Georgia appellate court held that a "no inference" instruction constituted comment on the defendant's failure to testify which the Georgia statute forbids and thus reversed the

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[41] See Appendix A-III.

[42] Minnesota's Supreme Court has recognized that the instruction may be necessary in some cases to prevent "manifest injustice." *State* v. *Grey*, 256 N.W.2d 74, 77-78 (Minn. 1977). Certainly, petitioner's case presents such a situation.

defendant's conviction. *Id.* at 632. However, in *Woodard* v. *State*, 234 Ga. 901, 218 S.E.2d 629 (1975), the Georgia Supreme Court disavowed the reasoning in *Linder* and held that a defendant is entitled to a protective instruction on request.[43]

> The language in such Code section that no comment shall be made because of such failure to testify must be construed in accordance with the first provision of such sentence, to wit; the failure to testify shall create no presumption against a defendant. Thus construed, what is prohibited is a comment that the defendant could have "denied," "explaines," or otherwise "disputed" the State's case against him. The forbidding of such comment would have nothing to do with a charge that the jury is to "make no assumption or draw any conclusions from the defendant's failure to testify." *Id.* at 632.

Compare State v. *Senzarino*, 224 N.E.2d 389, 393-398 (Ct.Common Pleas Ohio 1967), aff'd,15 Ohio App.2d 115, 239 N.E.2d 100, 105-106 (1968), *with State* v. *Nelson*, 36 Ohio St.2d 79, 303 N.E.2d 865, 869 (1973). Also *compare State* v. *Denison*, 352 Mo. 572, 178 S.W. 2d 449, 455 (1944), *with* MO.ANN.STAT., SUP.CT.R., R.CRIM.PROC.27.05.

The reasoning of the Georgia Supreme Court in *Woodard* v. *State*, *supra*, is compelling. The Georgia "no comment" statute, GA.CODE ANN. §38-415 (1974), is basically identical to Kentucky's. And that court has concluded that "no comment" must be interpreted as "no *adverse* comment" because of the statute's "no presumption" provision, which is also like Kentucky's. The Georgia court's reasoning is apparently accepted by many other courts since the vast majority of the states which prohibit comment by statute do require, explicitly or at least implicitly, a "no inference" instruction on request.[44]

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[43] *See also Clay* v. *State*, 236 Ga. 398, 224 S.E.2d 14 (1976).

[44] See Appendix A-I, Appendix A-II, Appendix A-III and Appendix B. Twenty-three states prohibit comment by statute. Eighteen of those permit or require a "no inference" instruction on request. Three, including Kentucky, prohibit such an instruction. No decision on the subject could be located for Delaware or Rhode Island.

Various states have described the prophylactic instruction in question as an essential one inextricably linked to the Fifth Amendment privilege against self-incrimination. The Alabama Supreme Court emphasized in *Perry* v. *State*, 368 So.2d 310, 312 (Ala. 1979) that the statute prohibiting the failure to testify from creating any presumption against a defendant "is so inexorably tied to the fundamental right against self-incrimination as to defeat any application of the harmless error doctrine." Remarking that "the denial of the requested instruction is tantamount to the denial of the fundamental right of the accused, as constitutionally and statutorily mandated, to elect not to testify," that court rejected the notion of analyzing each case in which the instruction was denied to determine whether the substantial rights of the accused had been violated in favor of an automatic reversal rule.

The New York Court of Appeals has also rejected application of a harmless error test to the refusal to tender to the jury a requested "no inference" instruction. *People* v. *Britt*, supra at 505. The court observed, "[h]ow diluted the exercise of this right would become if the jury were permitted to presume guilt on the basis of a defendant's refusal to testify." *Id.* at 506.

The Appellate Division of the New Jersey Superior Court has emphasized that the Fifth Amendment privilege would be destroyed if it were penalized by refusing a defendant's request for the prophylactic instruction in question. *State* v. *Smith*, 100 N.J. Super. 420, 242 A.2d 49, 51 (1968). See also *State* v. *McNeil*, 164 N.J.Super. 27, 395 A.2d 549, 551 (1978), where the court described the refusal of a requested "no inference" instruction as "clear constitutional error."

The only way to implement a statute's "no presumption" provision is to instruct the jurors that they may draw no inference from the defendant's failure to testify. *State* v. *Landry*, 85 Me. 95, 26 A. 998, 999 (Me. 1892). "The natural inclination of jurors would lead them to adopt the very presumption which the statute was designed to prevent." *Id.*

See Lakeside v. *Oregon*, 435 U.S. at 340. Unquestionably, Mr. Carter's failure to testify "was obvious and the jury could not help but be aware of it." *State* v. *Cook*, 182 Neb. 684, 157 N.W.2d 151, 155 (1968). A "no inference" instruction was thus an essential protection.

Even the Ohio Supreme Court, while noting that the Ohio Constitution and statutes permit both comment on and negative inferences from a defendant's failure to testify,[45] has held that a "no inference" instruction is under certain circumstances essential to a fair trial and the failure to give it may constitute reversible error. *State* v. *Nelson*, *supra* at 869.

Unquestionably, Kentucky is in a very small and dwindling minority of states in insisting that a "no inference" instruction constitutes prohibited "comment" on the failure to testify. *Green* v. *Commonwealth*, *supra*. Most of the states with "no comment" provisions like Kentucky's in their statutes or rules require a "no inference" instruction on request. This is so because "comment" means the "adverse comment" condemned by *Griffin* v. *California*, supra. The prophylactic instruction requested by petitioner implements the Fifth Amendment privilege and the closely related statutory prohibition against a defendant's failure to testify creating a presumption unfavorable to him. The views of the vast majority of the states are strong support for the thesis that the instruction tendered by petitioner and refused by the court was essential to a fair trial in accordance with the Due Process Clause of the Fourteenth Amendment.

Furthermore, the weight of scholarly authority supports petitioner's claim that he was entitled to a "no inference" instruction after declining to testify. This Court has considered the views of the community of legal scholars in determining whether a particular practice should be considered a fundamental right. *See Taylor* v. *Kentucky*, 436 U.S. at 483-484.

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[45] The court recognized that those provisions have been "banished" by *Griffin* v. *California*, *supra*. *State* v. *Nelson*, *supra* at 868.

Note, 40 TUL.L. REV. 409, 416 (1966), contains an excellent analysis of the reasons why a prophylactic instruction on the defendant's failure to testify is required by the Fifth Amendment.

Clearly, ". . . the trial court's refusal to so instruct should be constitutional error." Marcus-Wyner and King, *Courtroom Comment On An Accused's Reliance On The Privilege Against SelfIncrimination: California's Application Of Griffin* v. *California*, 9 U.CAL.D.L.REV. 603, 627 (1976). Another commentator has "submitted that the Court should extend the fifth amendment prohibition on comment so as to include the right of a defendant to a jury charge that his failure to testify does not create an inference of guilt." Note, 70 DICK.L.REV. *supra* at 119.

An important question was posed in 28 GEO.L.J. 417, 419 (1939):

> We might ask, in the absence of an instruction on the point what is to prevent a juryman from pressing it upon his fellow jurors?

The author emphasized that because the average juror "believes the defendant stamped with guilt because of his failure to testify, it would appear doubly vital that the jury be instructed that the law *forbids* the entertainment of such a belief." *Id.* at 418 (emphasis the author's). *See* also Soisson, *Comment To The Jury On Defendant's Failure To Testify*, 64 DICK.L.REV. 164, 166, 169, 171-172 (1960); 38 MICH.L.REV. 1322 (1940). The decisions of the great majority of states as well as the opinions of legal scholars clearly support Mr. Carter's claim that he was entitled by the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to a protective instruction after he declined to testify at his trial.

CONCLUSION

For the reasons stated above, Lonnie Joe Carter respectfully requests this Court to reverse the decision of the Supreme Court of Kentucky affirming his conviction.

Respectfully submitted,

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APPENDIX

APPENDIX A. JURISDICTIONAL SURVEY

I. States Which Require That A "No Inference" Instruction Be Given On Defense Request

State	Case(s), and/or Statute or Rule
1. Alabama	*Perry* v. *State*, 368 So.2d 310 (Ala. 1979) [No harmless error test]
2. Arizona	*State* v. *Piper*, 113 Ariz. 390, 555 P.2d 636, 639 (1976) *State* v. *Dean*, 447, P.2d 890, 894 (Ct.App.Ariz. 1968)
3. Arkansas	*Powell* v. *State*, 471 S.W.2d 333, 338 (Ark. 1971)*
4. California	*People* v. *Preston*, 107 Cal.Rptr. 300, 508 P.2d 300, 306 (1973) *People* v. *Gaulden*, 36 Cal.App.3d 942, 111 Cal.Rptr. 803, 811 (1974) CAL.EVIDENCE CODE §913 (Deering 1966)
5. Colorado	*Kimmel* v. *People*, 473 P.2d 167 (Colo. 1979)*
6. Connecticut	CONN.GEN.STAT.ANN. §54-84 (West 1958) (see Appendix B)
7. Georgia	*Clay* v. *State*, 236 Ga. 398, 224 S.E.2d 14 (1976)
8. Hawaii	*State* v. *Baxter*, 454 P.2d 366, 367 (Haw. 1969)*
9. Illinois	*People* v. *Greben*, 352 Ill. 582, 186 N.E. 162, 167 (1933) *People* v. *Lee*, 44 Ill.App.3d 43, 357 N.E.2d 888 (1978)**

10. Indiana	*Lyda* v. *State*, 395 N.E.2d 776, 780-781 (Ind. 1979) IND.CODE.ANN. 35-1-31-3 (Burns 1979)(see Appendix B)
11. Iowa	*State* v. *Osborne*, 139 N.W.2d 177, 178-179 (Iowa 1965)
12. Kansas	*State* v. *Goff*. 61 P. 683 (Kan. 1900) *State* v. *Perry*, 223 Kan. 230, 573 P.2d 989, 990 (1977)* KAN.STAT. §60-439 (1976)(see Appendix B)
13. Maine	*State* v. *Landry*, 85 Me. 95, 26 A. 998 (1892) *State* v. *Girard*, 283 A.2d 462, 464 (Me. 1971)*
14. Maryland	*Pearson* v. *State*, 28 Md.App. 196, 343 A.2d 916, 920 (1975)*
15. Michigan	*People* v. *Provost*, 144 Mich. 17, 107 N.W. 716 (Mich. 1906) *People* v. *Potts*, 55 Mich.App. 622, 223 N.W.2d 96, 101-102 (1974)*
16. Mississippi	*Funches* v. *State*, 125 Miss. 140, 87 So. 487, 488 (Miss. 1921)
17. Missouri	MO.ANN.STAT. SUP.CT.R., R.CRIM.PROC. 27.05 (see Appendix B)

18. New Jersey	*State* v. *McNeil*, 164 N.J.Super. 27, 395 A.2d 549, 551 (1978)** *State* v. *Smith*, 100 N.J. Super. 420, 242 A.2d 49, 50-51 (1968) *State* v. *DeStasio*, 49 N.J. 247, 229 A.2d 636, 638-639 (1967)
19. New Mexico	*State* v. *Spearman*, 84 N.M. 366, 503 P.2d 649, 651-652 (1972) *State* v. *Buchanan*, 76 N.M. 141, 412 P.2d 565, 567 (1966)[dictum about instruction being favorable to defendant] N.M.STAT.ANN,REV., R. 513 (1978)
20. New York	*People* v. *Britt*, 43 N.Y.2d 111, 371 N.E.2d 504, 506 (1977)[no harmless error test] N.Y.CRIM.PROC.LAW §300.10(2)(Consol. 1979)(see Appendix B)
21. North Carolina	*State* v. *Davis*, 241 S.E.2d 656, 660 (N.C. 1978)*
22. Oregon	*State* v. *Hale*, 537 P.2d 1173 (Ct.App.Ore. 1975)
23. South Carolina	*State* v. *White*, 133 S.E.2d 320, 322 (S.C. 1963)
24. South Dakota	*State* v. *Oswald*, 241 N.W.2d 566, 570 (S.C. 1976)
25. Vermont	*State* v. *Persuitti*, 346 A.2d 208, 209 (Vt. 1975)

26. Virginia	*Hines* v. *Commonwealth*, 234 S.E.2d 262, 266 (Va. 1977)*
27. Washington	*State* v. *Goldstein*, 400 P.2d 368, 369 (Wash. 1965)* *State* v. *Tate*, 444 P.2d 150, 153 (Wash. 1968)[dictum that instruction proper] WASH.REV.CODE.ANN. §10.52.040 (1961)(see Appendix B)
28. West Virginia	*State* v. *McClung*, 140 S.E. 55, 56 (W.Va. 1927) *State* v. *McClure*, 253 S.E.2d 555 (W.Va. 1979)

*In each of these cases, while the issue on appeal was not the failure to instruct on defense request, the court stated that a "no inference" instruction is required on defense request.

**In each of these cases the court referred to the state's pattern instruction.

II. States Which Have Indicated By Inference Or Implication That A "No Inference" Instruction Should Be Given On Defense Request

State	Cases
1. Florida	*Fogler* v. *State*, 117 So. 694, 695 (Fla. 1928) [court notes defendant's concession that instruction at defense request proper and aproves *sua sponte* instruction.] *DeLaine* v. *State*, 230 So.2d 168, 175 (Ct.App.Fla. 1970) [*sua sponte* instruction again approved.]

2. Idaho	*State* v. Levy, 75 P. 227, 231 (Idaho 1904) [*sua sponte* instruction approved.]
3. Louisiana	*State* v. *Dierlamm*, 189 La. 544, 180 So. 135, 137-138 (1938) [dictum — not "imperative duty" to instruct but gives defendant additional protection.]
4. Massachusetts	*Commonwealth* v. *Sullivan*, 239 N.E.2d 5, 16 (Mass. 1968) [*sua sponte* instruction approved]
5. Nebraska	*State* v. *Botts*, 184 Neb. 78, 165 N.W.2d 358, 359-360 (1968) [*sua sponte* instruction approved — dictum that defendant could have urged reversal if instruction not given.] *State* v. *Cook*, 182 Neb. 684, 157 N.W. 2d 151, 155 (1968) [*sua sponte* instruction commended]
6. New Hampshire	*State* v. *Fowler*, 261 A.2d 429 (N.H. 1970) [dictum-court indicates that trial courts should abide by defendant's wishes regarding instruction.]
7. North Dakota	*State* v. *Marmon*, 154 N.W.2d 55, 62 (N.D. 1967) [*sua sponte* instruction approved.]

8. Ohio	*State* v. Nelson, 36 Ohio St.2d 79, 303 N.E.2d 865, 869 (1973) [conviction reversed because of failure to give instruction but court says decision is in trial court's discretion.]
9. Pennsylvania	*Commonwealth* v. *Thomas*, 429 Pa. 227, 239 A.2d 354, 357-358 (1968) [court upholds instruction given in case although notes it could have been better.] *Commonwealth* v. *Danzy*, 225 Pa.Super 234, 310 A.2d 291, 292 (1973) [instruction proper in absence of objection by defendant.]
10. Tennessee	*Evans* v. *State*, 557 S.W.2d 927, 936 (Tenn. 1977) [Instruction described as "proper."] *Rowan* v. *State*, 369 S.W.2d 543, 548 (Tenn. 1963) [no duty to give instruction *sua sponte*.]
11. Texas	*Jaffrion* v. *State*, 501 S.W.2d 322 326 (Tex. 1973) [Trial courts may give "no inference" instruction but failure to do so *sua sponte* does not constitute reversible error.]
12. Utah	*State* v. *Cox*, 277 P. 972, 973-974 (Utah 1929)["no inference" instruction cured error in prosecutor's comment on silence of defendant at trial.]

13. Wisconsin	*Champlain* v. *State*, 53 Wis.2d 751, 193 N.W.2d 868, 873 (1972)[*sua sponte* instruction approved — dictum that "better practice" is for trial court to give instuction only at defendant's request.]

III. States Which Prohibit A "No Inference" Instruction

State	Cases
1. Kentucky	*Green* v. *Commonwealth*, 488 S.W.2d 339, 341-342 (Ky. 1972)
2. Minnesota	*State* v. *Sandve*, 156 N.W.2d 230, 233-234 (Minn. 1968) *State* v. *Grey*, 256 N.W.2d 74, 77-78 (Minn. 1977)*
3. Nevada	*Jackson* v. *State*, 438 P.2d 795, 798 (Nev. 1968)** NEV.REV.STAT. §175.181 (1979) (see Appendix B)
4. Oklahoma	*Brannin* v. *State*, 375 P.2d 276, 279-280 (Okla.Cr. 1962) *Hanf* v. *State*, 560 P.2d 207, 212 (Okla.Cr. 1977)
5. Wyoming	*Kinney* v. *State*, 256 P. 1040, 1042 (Wyo. 1927)

*Minnesota Supreme Court indicates that instruction may be necessary in some cases to prevent manifest injustice.

**NEV.REV.STAT. §175.181 (1979) which specifically prohibits a "no inference" instruction permits an instruction that a defendant cannot be compelled to be a witness against himself.

APPENDIX B. STATE STATUTES OR RULES RELEVANT TO DRAWING INFERENCES FROM DEFENDANT'S FAILURE TO TESTIFY AND/OR COMMENT UPON THAT FAILURE

1. Alabama — ALA. CODE tit.12 §12-21-220 (1975)+

   §12-21220. Right of defendant to be witness; effect of prosecution's comment on defendant's failure to testify.

   On the trial of all indictments, complaints or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him nor be the subject of comment by counsel. If the district attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within 30 days from entry of the judgment.

2. Arizona — ARIZ.REV.STAT. §13-117 (1956).

   §13-117. Defendant as witness; no comment on failure to testify

   A. A defendant in a criminal action or proceeding shall not be compelled to be a witness against himself, but may be a witness in his own behalf. If he offers himself as a witness in his own behalf, he may be cross-examined to the same extent and subject to the same rules as any other witness.

   B. The defendant's neglect or refusal to be a witness in his own behalf shall not in any manner prejudice him, or be used against him on the trial or proceedings.

3. Arkansas — ARK.STAT.ANN §43-2016 (1947)

   §43-2016. Accused as witness.

   On trial of all indictments, informations, complaints,

and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the State of Arkansas, the person so charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him.

4. California — CAL. EVIDENCE CODE §913 (Deering 1966)++

   §913. Comment on, and inferences from, exercise of privilege.

   (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

   (b)The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

5. Connecticut — CONN.GEN.STAT.ANN. §54-84 (West 1958)++

   §54-84. Testimony or silence of accused. Privilege of spouse.

   (a) Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify upon such trial. If such person has a

husband or wife, he or she shall be a competent witness but may elect or refuse to testify for or against the accused, except that either spouse who has received personal violence from the other or is the spouse of one who is charged with violation of any sections 53-20, 53-21, 53-23, 53-25, 53-304, 53a-72 and 53a-83 to 53a-88, inclusive, may, upon his or her trial for offenses arising out of such personal violence or from violation of the provisions of any of said sections, be compelled to testify in the same manner as any other witness. The neglect or refusal of an accused party to testify shall not be commented upon by the court or prosecuting official, except as provided in subsection (b) of this section.

(b) Unless the accused requests otherwise, the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify. In cases tried to the court, no unfavorable inferences shall be drawn by the court from the accused's silence.

6. Delaware — DEL. CODE tit. 11, §3501 (1979)+

§3501. Testimony of accused persons.

Every person who is accused of any crime whatsoever, punishable by the laws of this State, may upon his trial before any tribunal established by the Constitution or laws of this State, testify in his own behalf, and may testify for or against any other person jointly tried with him. A refusal or failure to testify shall not be construed or commented upon as an indication of guilt.

7. Florida — FLA.STAT.ANN., R.CRIM.PROC., R.3.250+

Rule 3.250. Accused as Witness

In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and

shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury.

8. Georgia — GA. CODE ANN. §38-415 (1974)+

38-415 (1036 P.C.) Prisoner's testimony.

If the prisoner wishes to testify and announces in open court his intention to do so, he may so testify in his own behalf. If so, he shall be sworn as any other witness and may be examined and cross-examined as any other witness, except that no evidence of general bad character or prior convictions shall be admissible unless and until the defendant shall have first put his character in issue. Evidence of prior felony convictions may be admitted in those cases where the same are alleged in the indictment as provided by law. The failure of a defendant to testify shall create no presumption against him, and no comment shall be made because of such failure: Provided, however, in the event the defendant elects to be sworn and examined, he shall not lose his right to open and conclude the argument to the jury, if he has not introduced other evidence in the trial.

9. Hawaii — HAV.REV.STAT. §621-15 (1976)

§621-15. Accused; refusal to testify not prejudicial.

The defendant in any criminal proceeding may give evidence on his own behalf, and thereupon be subject to cross-examination in like manner as any other witness, but in case any such person neglects or declines to offer himself as a witness no inference

shall be drawn prejudicial to the accused by reason of such neglect or refusal, nor shall any argument be permitted tending to injure the defense of the accused person on account of such failure to offer himself as a witness.

10. Idaho — IDAHO CODE §19-3003 (1949)

§19-3003. Defendant not obliged to testify.

A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding.

11. Illinois — ILL.ANN.STAT. ch. 38, §155-1 (Smith-Hurd 1973)+

§155-1. Disqualifications Removed — Testimony of Husband or Wife.

No person shall be disqualified as a witness in any criminal case or proceeding by reason of his or her interest in the event of the same, as a party or otherwise, or by reason of his or her having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of the witness: Provided, however, that a defendant in any criminal case or proceeding shall only at his or her own request be deemed a competent witness, and the person's neglect to testify shall not create any presumption against the person, nor shall the court permit any reference or comment to be made to or upon such neglect.

In all criminal cases, husband and wife may testify for or against each other: provided, that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage, except in cases

where either is charged with an offense against the person or property of the other or in case of spouse abandonment, or where the interests of their child or children are directly involved, or as to matters in which either has acted as agent of the other.

12. Indiana — IND.CODE ANN. §35-1-31-3 (Burns 1979)

§35-1-31-3 [9-1603]. Who are competent witnesses.

The following persons are competent witnesses:

First. All persons who are competent to testify in civil actions.

Second. The party injured by the offense committed.

Third. Accomplices, when they consent to testify.

Fourth. The defendant, to testify in his own behalf. But if the defendant do [sic] not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the duty of the court, in such case, in its charge, to instruct the jury as to their duty under the provisions of this section.

13. Kansas — KAN.STAT. §60-439 (1976) $^{+}_{+}$

§60-439. Reference to exercise of privilege; presumption and adverse inference not permitted.

If a privilege is exercised not to testify or to prevent another from testifying either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein

provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or may be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

14. Kentucky — KY.REV.STAT. §421.225 (1979)+

421.225. Testimony of defendant.

In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him.

15. Maine — ME.REV.STAT.tit.15, §1315 (1964)

§1315. Self-incrimination; failure to testify; husband or wife as witness

In all criminal trials, the accused shall, at his own request but not otherwise, be a competent witness. He shall not be compelled to testify on cross-examination to facts that would convict, or furnish evidence to convict him of any other crime than that for which he is on trial. The fact that he does not testify in his own behalf shall not be taken as evidence of his guilt. The husband or wife of the accused is a competent witness except in regard to marital communications.

16. Maryland — MD. CTS. AND JUD. PROC. §9-107 (1980)

§9-107.22Defendant in a criminal trial.

A person may not be compelled to testify in violation of his privilege against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him.

17. Massachusetts — MASS.GEN.LAWS ANN.ch. 233, §20 (West 1959)

§20. Competency of Witnesses.

Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows:

First, Except in a proceeding arising out of or involving a contract made by a married woman with her husband and except in a proceeding under chapter two hundred and seventy-three A and in a prosecution begun under sections one to ten, inclusive, of chapter two hundred and seventythree, neither husband nor wife shall testify as to private conversations with the other.

Second, Except as otherwise provided in section seven of chapter two hundred and seventy-three, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other.

Third, The defendant in the trial of an indictment, complaint or other criminal proceeding shall, at his own request, but not otherwise, be allowed to testify, but his neglect or refusal to testify shall not create any presumption against him.

18. Michigan — MICH.COMP.LAWS ANN. §600.2159 (1968)+

§600.2159 Parties as witnesses; depositions; comment on failure of criminal defendant to testify

Sec. 2159. On the trial of any issue joined, or in any matter, suit or proceeding, in any court, or on any inquiry arising in any suit or proceeding in any court, or before any officer or person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties to any such suit or proceeding named in the record; and persons for

whose benefit such suit or proceeding is prosecuted, or defended, may be witnesses therein in their own behalf or otherwise, in the same manner as other witnesses, except as hereinafter otherwise provided; and the deposition of any such party or person may be taken and used in evidence under the rules and statutes governing depositions, and any such party or person may be proceeded against and compelled to attend and testify, as is provided by law for other witnesses. No person shall be disqualified as a witness in any civil or criminal case or proceeding by reason of his interest in the event of the same as a party or otherwise or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility. A defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the cour tpermit any reference or comment to be made to or upon such neglect.

19. Minnesota — MINN.STAT.ANN. §611.11 (West 1964)+

§611.11 No presumption from failure to testify

The defendant in the trial of an indictment, complaint, or other criminal proceeding shall, at his own request and not otherwise, be allowed to testify; but his failure to testify shall not create any presumption against him, nor shall it be alluded to by the prosecuting attorney or by the court.

20. Mississippi — MISS.CODE ANN. §13-1-9 (1972)

§13-1-9. Competency of an accused.

The accused shall be a competent witness for himself in any prosecution for crime against him. The failure of the accused, in any case, to testify shall not however operate to his prejudice or be commented on by counsel.

21. Missouri — MO.ANN.STAT., SUP.CT.R., R.CRIM.PROC.27.05 ++

Rule 27.05. Misdemeanors or Felonies — Failure of Defendant or Wife to Testify

(a)If the defendant shall not avail himself or herself of his or her right to testify, or of the testimony of the wife or husband, on the trial in the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place.

(b) If the defendant does not testify, and the defendant so requests, but not otherwise, the court shall instruct the jury in writing as follows:

"Under the law, a defendant has the right not to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that defendant did not testify."

22. Nevada — NEV.REV.STAT. §175.181 (1979)**

§175. 181. Instruction not to be given relative to failure of defendant to testify.

1. No instruction shall be given relative to the failure of the person charged with the commission of crime or offense to testify, except, upon the request of the person so charged, the court shall instruct the jury that, in accordance with a right guaranteed by the constitution, no person can be compelled, in a criminal action, to be a witness against himself.

2. Nothing herein contained shall be construed as compelling any such person to testify.

23. New Hampshire — N.H.REV.STAT.ANN. §516:31 & §516:32 (1974)+

§516:31. Respondents in Criminal Cases.

In the trial of indictments, complaints and other proceedings against persons charged with the commission of crimes and offenses the person so charged shall, at his own request, but not otherwise, be a competent witness.

§16:32. Limitation.

Nothing herein contained shall be construed as compelling any such person to testify, nor shall any inference of his guilt result if he does not testify, nor shall the counsel for the prosecution comment thereon in case the respondent does not testify.

24. New Jersey — N.J.STAT.ANN. §2A:84A-17 (West 1952*

2A:84A-17. Privilege of accused

Rule 23.

(1) Every person has in any criminal action in which he is an accused a right not to be called as a witness and not to testify.

Additions in text indicated by *underline*; deletions by ~~strikeouts~~

(2) The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse and the accused shall both consent, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent or (c) such spouse is the complainant.

(3) An accused in a criminal action has no privilege to refuse when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

~~(4) If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that accused cannot truthfully deny these facts.~~

Amended Sept. 14, 1979, effective July 1, 1980.

25. New Mexico — N.M.STAT.ANN., R.EV., R. 513+ +

Rule 513. Comment upon or inference from claim of privilege; instruction

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

26. New York — N.Y.CRIM.PROC LAW §300.10 (Consol. 1979)+ +

§300.10. Court's charge; in general

1. At the conclusion of the summations, the court must deliver a charge to the jury.

2. In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. Such principles include, but are not limited to, the presumption of the defendant's innocence,

the requirement that guilt be proved beyond a reasonable doubt and that the jury may not, in determining the issue of guilt or innocence, consider or speculate concerning matters relating to sentence or punishment. Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn. The court must also state the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts, but it need not marshal or refer to the evidence to any greater extent than is necessary for such explanation.

27. North Carolina — N.C.GEN.STAT. §8-54 (1969)

§8-54. Defendant in criminal action competent but not compellable to testify.

In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise a competent witness, and, his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to crossexamination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself.

28. North Dakota — N.D.CENT.CODE §29-21-11 (1974)+

§29-21-11. Defendant witness in own behalf.

In the trial of a criminal action or proceeding before any court or magistrate of this state, whether prosecuted by information, indictment, complaint, or otherwise, the defendant, at his own request and not otherwise, shall be deemed a competent witness, but his neglect or refusal to testify shall not create or raise any presumption of guilt against him. Nor shall such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place.

29. Ohio — OHIO REV.CODE ANN. §2945.43 (Baldwin 1971)*

§2945.43. Defendant may testify.

On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel.

30. Oklahoma — OKLA.STAT.ANN.tit.22, §701 (West 1969)+

§701. Defendant a competent witness — Comment on failure to testify — Presumption

In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court or committing magistrate in this State, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel it shall be ground for a new trial.

31. Oregon — OR.REV.STAT. §136.643 (1979)

§136.643. Defendant as witness.

In the trial of or examination upon any indictment complaint, information or other proceeding before any court, magistrate, jury or other tribunal against a person accused or charged with the commission of a crime, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury or other tribunal before which such testimony is given. His waiver of this right creates no presumption against him. The defendant or accused, when offering his testimony as a witness in his own behalf, gives the prosecution a right to cross-examination upon all facts in which he has testified and which tend to his conviction or acquittal.

32. Pennsylvania — PA.STAT.ANN.tit.42 §5941 (Purdon 1975)+

§5941. Persons who may be compelled to testify.

(a) General rule — Except defendants actually upon trial in a criminal proceeding, any competent witness may be compelled to testify in any matter, civil or criminal; but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to incriminate him; nor may the neglect or refusal of any defendant, actually upon trial in a criminal proceeding, to offer himself as a witness, be treated as creating any presumption against him, or be adversely referred to by court or counsel during the trial.

33. Rhode Island — R.I.GEN.LAWS §12-17-9 (1969)+

§12-17-9. Defendant as witness.

No respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent; and neglect or

refusal so to testify shall create no presumption nor be used in argument against him.

34. South Dakota — S.D. COMPILED LAWS ANN. §23A-22-6 (1979)

§23A-22-6. Defendant's right to testify. No presumption from failure to testify.

In a trial of all indictments, informations, complaints and other proceedings before any court or magistrate, against persons charged with the commission of any crime, the person charged shall, at his own request, but not otherwise, be a competent witness. His failure to make such request does not create any presumption against him.

35. Tennessee — TENN.CODE ANN. §40-2403 (1975).

§40-2403. Failure of defendant to testify — Order of testimony.

The failure of the party defendant to make such request and to testify in his own behalf, shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heared by the court trying the case.

36. Texas — TEX.STAT.ANN.Art. 38.08 (1979)+

Art. 38.08. Defendant may testify.

Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause.

37. Utah — UTAH CODE ANN. §77-44-5 (1978)

§77-44.5. Cross-examination of defendant — Failure to testify not to prejudice.

If a defendant offers himself as a witness, he may be cross-examined by the counsel for the state the same as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice him or be used against him on the trial or proceeding.

38. Vermont — VT.STAT.ANN.tit. 13, §6601 (1974)+

§6601. Respondent as witness.

In the trial of complaints, informations, indictments and other proceedings against persons charged with crimes or offenses, the person so charged shall, at his own request and not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court but the failure of such person to testify shall not be a matter of comment to the jury by either the court or the prosecutor and shall not be considered by the jury as evidence against him.

39. Virginia — VA.CODE §19.2-268 (1975)§

§19.2-268. Right of accused to testify.

In any case of felony or misdemeanor, the accused may be sworn and examined in his own behalf, and is so sworn and examined, he shall be deemed to have waived his privilege of not giving evidence against himself, and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney.

40. Washington — WASH.REV.CODE ANN. §10.52.040 (1961)+ +

§10.52.040. Compelling witness to attend and testify — Accused as witness — Admonitory instructions.

Witnesses may be compelled to attend and testify before the grand jury; and witnesses on behalf of the state, or of the defendant, in a criminal prosecution, may be compelled to attend and testify in open court, if they have been subpoenaed, without their fees being first paid or tendered, unless otherwise provided by law; the court may, upon the motion of the prosecuting attorney or defense counsel, recognize witnesses, with or without sureties, to attend and testify at any hearing or trial in any criminal prosecution in any court of this state, or before the grand jury. In default of such recognizance, or in the event that surety is required and has not been obtained the court shall require the appearance of the witness before the court and shall appoint counsel for the witness he if he is indigent and then shall determine that the testimony of the witness would be material to either the prosecution or the defendant and that the witness would not attend the trial of the matter unless detained and, therefore, the court may direct that such witness shall be detained in the custody of the sheriff until the hearing or trial in which the witness is to testify: Provided, That each witness detained for failure to obtain surety shall be paid, in addition to witness fees for actual appearance in court, for each day of his detention a sum equal to the daily jury fee paid to a juror serving in a superior court; and each witness in breach of recognizance and who is detained therefor shall be paid, in addition to witness fees for actual appearance in court, the sum of one dollar for each day of his detention. Any such witness shall be provided food and lodging while so detained. Any person accused of any crime in this state, by indictment information, or otherwise, may, in the examination or trial of the cause, offer himself, or herself, as a witness in his or her own behalf, and

shall be allowed to testify as other witnesses in such case, and when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examination of other witnesses. Provided, That nothing in this code shall be construed to compel such accused person to offer himself or herself as a witness in such case: And provided further, That it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf.

41. West Virginia — W.VA.CODE §57-3-6 (1966)+

§57-3-6. Competency of accused as witness.

In any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, with his consent (but not otherwise), be a competent witness on such trial or examination; and if he so voluntarily becomes a witness he shall, as to all matters relevant to the issue, be deemed to have waived his privilege of not giving evidence against himself and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by anyone.

42. Wisconsin — WIS.STAT.ANN. §325.13 (West 1958)

§325.13. Party may be witness, credibility

(1) No person shall be disqualified as a witness in any action or proceeding, civil or criminal, by reason of his interest therein; and every person shall, in every such case, be a competent witness, except as otherwise provided in this chapter. But his interest or connection may be shown to affect the credibility of the witness.

(2) In all criminal actions and proceedings the party charged shall at his own request, but not otherwise,

be a competent witness; but his refusal or omission to testify shall create no presumption against him or any other party thereto.

43. Wyoming — WYO.STAT. §7-11-401 (1977)

§7-11-401. Testimony of defendant.

The defendant in all criminal cases, in all the courts in this state, may be sworn and examined as a witness, if he so elects, but shall not be required to testify in any case unless he has been lawfully granted immunity from prosecution, penalty or forfeiture and the neglect or refusal to testify without such immunity having been granted shall not create any presumption against him, nor shall any reference be made to, nor shall any comment be made upon, such neglect or refusal to testify.

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* New Jersey and Ohio are the only states with statutes which recently permitted comment on the defendant's failure to testify. However, N.J.STAT.ANN. § 2A:84A-17(4) (West 1952) was repealed effective July 1, 1980. And Ohio's Supreme Court has declared OHIO REV. CODE ANN. § 2945.43 (Baldwin 1971) unconstitutional in *State* v. *Nelson*, 36 Ohio St. 2d 79, 303 N.E.2d 865, 868 (1973).

* NEV.REV.STAT. § 175.181 (1979) which specifically prohibits a "no inference" instruction but permits an instruction that a defendant cannot be compelled to be a witness against himself is unique.

+ These twenty-three states specifically prohibit comment on the defendant's failure to testify.

+ + These seven states require by statute that the trial court give a "no inference" instruction when the defendant does not testify. However, California, Connecticut, Kansas, Missouri, New Mexico, and New York provide that the instruction should only be given at the defendant's request.

APPENDIX C. SAMPLE STATE PATTERN INSTRUCTIONS

1. Kansas — KAN.STAT. P.I.K. 5213

   PIK 52.13 Defandant's Failure to Testify.

   You should not consider the fact that the defendant did not testify in arriving at your verdict.

   Notes on Use

   This instruction should not be given unless there is a specific request by the defendant.

2. New Mexico — N.M.STAT.ANN.JUD. VOL.2, U.J.I. — CRIM. 40.31

   UJI Crim. 40.31. Defendant not testifying; no inference of guilt.[1]

   You must not draw any inference of guilt irom the fact that the defendant did not testify in this case, nor should this fact be discussed by you or enter into your deliberation in any way.

   Use Note

   [1]This instruction must be given on request of a defendant who does not testify and must not be given if the defendant objects.

No. 80-5060

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

LONNIE JOE CARTER - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the Fifth and Fourteenth Amendments to the United States Constitution require the state court, in this case, to grant the defendant's request to instruct the jury that "the defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5060

LONNIE JOE CARTER - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF KENTUCKY

BRIEF FOR RESPONDENT

OPINION AND JUDGMENT BELOW

The judgment in this case was entered by the Christian County, Kentucky, Circuit Court, on June 1, 1979. (Joint Appendix, hereinafter A, 9-10).

JURISDICTION

The opinion of the Kentucky Supreme Court was rendered on May 13, 1980, and is not reported. (A 73, 74).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner has also made mention of the Sixth Amendment.

COUNTERSTATEMENT OF THE CASE

After a jury trial, petitioner was found guilty of third degree burglary in violation of Kentucky Revised Statute (hereinafter KY. REV. STAT.) 511.040 and was sentenced to two years' imprisonment.[1] In the second phase of the bifurcated trial, petitioner was found guilty of being a persistent felony offender and his sentence was enhanced to twenty years' imprisonment. (A 9).[2] Petitioner's prior felonies included "Store-

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[1]KY. REV. STAT. 511.040 at the time of the crime stated: "(1) A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime. (2) Burglary in the third degree is a Class D felony." A Class D felony is punishable by not less than one nor more than five (5) years imprisonment. KY. REV. STAT. 532.060 (2)(d).

[2]KY. REV. STAT. 532.080 states in part: "(3) A persistent felony offender in the first degree is a person who is more than twenty-one years of age and who stands convicted of a felony after having been convicted of two or more felonies. . . . * * * (6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows: . . . (b) If the offence for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten

(Footnote continued on next page)

house Breaking" in 1973 in violation of KY. REV. STAT. 433.190 (the statute has since been replaced by a criminal code in Kentucky) and "Knowingly Receiving Stolen Property over a Hundred dollars ($100)" in 1977, in violation of KY. REV. STAT. 514.110(a)(3), (4).

Officer Deborah Ellison, of the Hopkinsville Police Department, was on patrol on December 22, 1978, at approximately 1:50 a.m., in downtown Hopkinsville. (A 18). She observed two black males along the side of a building in an alley. She shined her spotlight down the alley and, when she did so, the individuals began running. When the officer drove her cruiser down the alley she saw a hole had been knocked in the side of a building housing Young's Hardware. There were two coats lying at the scene of the crime and some other items which she believed came from the store. (A 19). Officer Ellison called for Officer Leroy Davis, who she knew was in the area, alerting him as to the direction in which the individuals were running. (A 19, 30).

Officer Leroy Davis was sitting in his car near the alley when he heard Officer Ellison give out a call that there were two black males running towards Fifth Street. He saw them when they came out of the alley and, after a chase apprehended petitioner and placed

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(Footnote continued from preceding page)
years nor more than twenty years. (7) A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten years."

him under arrest. (A 37, 38).[3] One of the individuals Officer Ellison saw running from the scene carried with him some type of gym bag. (A 23). During the chase petitioner dropped two items that were in his hands. (A 38). One of the items was a bag and the other item was a radio that was set on a police band, and in which he would have been able to hear communications between the police department and patrol cars. (TE 40). The radio had an ear phone that could be placed in the ear. *Id.* Even though it was cold that night (A 23), when apprehended petitioner did not have on an outer coat. (A 41). Although Officer Ellison did not get a close look at the face of the man in the alley, she was able to testify that petitioner fit the description of one of the individuals she had seen. (A 36). Petitioner wore rather distinctive looking clothing, which Officer Ellison testified was the same type of clothing the individual had on when she first discovered him in the alley. (A 36).

It was shown that partial entrance to Young's Hardware Store was gained though the hole in the wall. Items which were on a storage rack inside of the building were pulled from the hole in the wall and taken to the outside of the building where they were found on the ground along with the coats. (Transcript of Evidence of State Court Trial, hereinafter TE, 80, 81). (A 20).

Petitioner was read his *Miranda* rights and presented with a form for his signature. He stated at

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[3]The other individual apparently escaped.

that time that he did not want to make a statement and refused to sign the form. (A 24, 25). In a later conversation, a police officer asked petitioner if he intended to take the "rap" alone or if he wanted to implicate the other individual. Petitioner responded by stating that there was no individual other than himself and that both of the jackets found at the scene were his. (A 49).

During the voir dire of prospective jurors, the trial judge stated the following:

> ". . . The fact that this man is under a charge or has been indicted has no weight against him as evidence. It is not evidence of his guilt and is not to be considered by you as evidence of his guilt. It is simply a part of the court process which starts, as I have said, the wheels turning to get the case started to be tried. It means nothing more than that. He sits there before you today presumed by the law to be as innocent as anyone else in this court room. I want you to fully understand that. Sometimes it is not easy to do, but you are to put out of your mind the fact that he is accused of this crime to the point where you will not consider him in any way guilty until and unless the Commonwealth meets its burden and by that I mean the Commonwealth must prove his guilt to your satisfaction beyond a reasonable doubt and if they fail to do that, you should find him not guilty. . . ." (A 14, 15)

During his opening statement counsel for petitioner stated to the jury:

> ". . . I suppose that most of you would issue a true bill if Mr. Ruff [the prosecutor] told you what he has just told you and you didn't have a chance to hear what the defendant had to say for himself. Now, that is just completely contrary to our system of law. A man, as the judge has already told you, a person is innocent until they are proved guilty and that's the duty of the prosecutor, to prove beyond a reasonable doubt to you that this man is guilty of the crime for which he is charged. . . .
>
> So I ask you to remember one thing, that this is your duty as a citizen of this country being on the jury and remember that our system and probably the cornerstone of it allows, or says that a person is innocent until they are proved guilty. . . ." (A 16, 17).

After the Commonwealth announced closed, the trial court held a conference with counsel and petitioner outside of the hearing on the jury for the purpose of determining which of petitioner's prior felony convictions could be used for impeachment purposes pursuant to the directives of the Kentucky Supreme Court in the case of *Cotton* v. *Commonwealth,* Ky., 454 S. W. 2d 698 (1970). Two prior felonies from a list of ten or more were chosen with the permission of the court to be used for impeachment purposes should petitioner choose to take the stand. (A 54-57). Petitioner offered no witnesses or testimony on behalf of the defense. The court then instructed the jury on third degree burglary and stated:

> "The law presumes a defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty *unless you are satisfied from the evidence alone,* and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty." (A 8). [Emphasis added.]

Petitioner offered the following instruction, which was refused by the trial court:

> "The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." (A 5).

During closing argument counsel for petitioner explained why his client had not taken the stand in the following manner:

> "Ladies and gentlemen of the jury, I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify? Let me tell you. The judge just read to you that the man is presumed innocent and that it is up to the prosecution to prove him guilty beyond a reasonable doubt. He doesn't have to take the stand in his own behalf. He doesn't have to do anything. . . ." (A 60).

Later counsel for petitioner returned to the same explanation by stating:

> "You know I don't know what happened out there that night. Lonnie Carter says that he is innocent.

> That is what he says when he says that I am not guilty and he doesn't have to get on that stand to say it. 'I didn't do it', he says, by saying that he is not guilty. . . ." (A 63).

After deliberation the jury returned, finding petitioner guilty and recommending a penalty of two years in the penitentiary. (TE 127). Having found the petitioner guilty during the burglary phase of the trial, evidence was then introduced during the second phase of the case involving the allegation that appellant was a persistent felony offender. After witnesses presented the jury with rather routine testimony concerning petitioner's date of birth and the time spent in the penitentiary concerning the felony convictions in question (TE 133-137), the Commonwealth closed this phase of its case. During the Persistent Felony Offender phase of the case, counsel for petitioner asked no questions of the witnesses and petitioner offered no evidence in his behalf. *Id.* Petitioner apparently admitted being a persistent felony offender, for, in closing argument, counsel for petitioner stated to the jury that petitioner could not contest the fact that he had had the two previous felony convictions. Instead he asked the jury through their "grace and mercy" to set a minimum sentence. (TE 139). After hearing the evidence, the jury returned with a verdict of guilty and recommended punishment at twenty years' imprisonment. (TE 143). Judgment was accordingly entered. (A 9, 10).

After conviction petitioner appealed to the Kentucky Supreme Court. Petitioner complained of some

nine (9) different allegations of error, including the one issue presented to this court on the petition for certiorari. On May 13, 1980, the Supreme Court of Kentucky rendered its opinion which is not to be published and which affirmed the conviction. (A 73). The Supreme Court of Kentucky ruled that each of the allegations of error was without merit. In concluding that the trial court did not commit error by refusing an instruction to the jury regarding the appellant's right not to testify, the court pointed to Kentucky Revised Statute 421.225, which provides:

> "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him."

The court cited its previous decision in *Green* v. *Commonwealth,* Ky., 488 S. W. 2d 339 (1972) as controlling on this issue. (A 77, 78).

SUMMARY OF ARGUMENT

Since 1903, the appellate courts in Kentucky have consistently held that a "no inference" instruction is not in the best interests of the accused. Kentucky courts have reasoned that to give the "no inference" instruction would do violence to the Kentucky legislature's intention of fully protecting the rights of an accused standing as a defendant on trial. The courts held that the "no inference" instruction would violate the Kentucky statute which states that a defendant's

silence in a criminal prosecution shall not be commented upon or create any presumption against him.

The congress enacted a federal statute which permitted the defendant to testify but did not contain the Kentucky language that the failure to testify shall not be commented upon. In interpreting the federal statute this court held that the failure to give the instruction in a federal case was error. The court later held that a state prosecutor and trial court were not permitted to make comment on a defendant's failure to take the stand and testify. Finally, in that chain of cases, the court held that it was not error for a state trial judge to give a "no inference" instruction over the objection of a defendant. The question of whether a defendant in a state criminal trial proceedings could constitutionally require the instruction was specifically reserved by the court and is the subject of this appeal. Respondent contends that nothing in the Constitution requires the instruction.

The Fifth Amendment originated in England as a weapon against forcing a defendant to give evidence against himself on pain of incarceration, banishment, or mutilation. The lurid realities which lay behind the enactment of the Fifth Amendment are a far cry from the subject matter of this case. The Constitution does not require the instruction in state court proceedings. Such a requirement would be an overextension of the concepts behind the adoption of the Fifth Amendment.

The wisdom of whether the "no inference" instruction should be given is not at issue in this case. States should be free to formulate their own rules to protect

their citizens in criminal court proceedings provided such rules do not violate the United States Constitution. The suggestion that a criminal defendant is coerced into testifying or in some way suffers harm when the "no inference" instruction is not given is unfounded and assertions to this effect are speculative. Interpretation of constitutional requirements should not be based upon such speculative assertions.

The evidence of petitioner's guilt in this case was overwhelming. Petitioner was caught near the scene and made statements which incriminated him. While it is urged by respondent that the Fifth Amendment does not require the "no inference" instruction in state court proceedings, it is also pointed out that even if such an instruction were required, any error that might have been committed would have been harmless beyond a reasonable doubt.

The trial in this case was meticulously fair to petitioner. The court emphasized during voir dire that petitioner was presumed by the law to be as innocent as anyone else in the courtroom and that unless the Commonwealth met its burden of proof beyond a reasonable doubt, petitioner should be found not guilty. After the evidence was presented the court instructed the jury that they should judge a case only on the evidence that was presented at trial. In substance, petitioner therefore received the instruction he was seeking. Petitioner's alternate argument that under the facts of this case there is a Fourteenth Amendment violation is therefore without merit.

Finally, petitioner's suggestion that he failed to testify in this case because he would have had to admit prior felonies which were part of the second phase of the bifurcated proceedings is not substantiated by the record. During the second phase of the trial petitioner did not cross-examine any of the witnesses and in effect admitted that he had been convicted of committing the prior felonies.

It is therefore apparent that neither the Fourteenth nor the Fifth Amendments to the United States Constitution was violated by petitioner's conviction.

ARGUMENT

THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DID NOT REQUIRE THE "NO INFERENCE" INSTRUCTION IN THIS CASE.

A. The Fifth Amendment Does Not Require the Trial Court to Instruct the Jury That No Adverse Inference Should Be Drawn From the Defendant's Silence At Trial.

The Fifth Amendment privilege against self-incrimination developed in England as a weapon against torture and unjust incarceration of an accused.[4] An accused under the Star Chamber proceedings was coerced into giving evidence, for if he declined to answer questions, he did so on pain of incarceration, banishment, or mutilation. These lurid realities which

[4]Note, *Prosecutorial Comment and Judicial Instruction on a Defendant's Failure to Testify: In Support of a Liberal Application of the Fifth Amendment.* 13 VALPARAISO UNIVERSITY LAW REVIEW 261 (1978).

lay behind enactment of the Fifth Amendment are a far cry from the subject matter of the case *sub judice.* [*Dissent, Griffin* v. *California,* 380 U. S. 609, 620 (1965)]. The abuses of Star Chamber type proceedings more than justified inclusion in the Constitution of a provision guaranteeing an accused's right to remain silent. Modern day justice in the courts of Kentucky and other states do not require an overreaction and extension of the theory giving rise to the amendment.

As early as *Wilson* v. *United States,* 149 U. S. 60 (1893), this court noted a preference for silence on a defendant's decision not to testify at trial. Being concerned that the jury might impose an adverse presumption against the defendant for remaining silent, this Court stated:

> "To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. *The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it.*" *Id.,* at 65. [Emphasis added].

In *Bruno* v. *United States,* 308 U. S. 287 (1939), the court had before it the "narrow question" of whether a federal statute required a federal trial court to instruct the jury upon request that the failure of the defendant to take the stand and testify in his own behalf does not create any presumption against him. The court held that an accused should be allowed to make his own choice of whether such an instruction should be given when an ". . . act of congress au-

thorizes him to choose." *Id.,* at 294. The Fifth Amendment was not involved.

The extent to which the defendant has control over the giving of such instruction was seen as a matter which was subject to regulation, either by the courts or by a statute. The federal jurisdiction is governed by 18 USC §3481. The Commonwealth of Kentucky is governed by Ky. Rev. Stat. 421.225. Each jurisdiction remains free within constitutional limitations to formulate rules regarding silence and failure to testify. *Jenkins* v. *Anderson,* —— U. S. ——, 100 S. Ct. 2124, 2130, 65 L. Ed. 2d 86 (1980). It should be noted that the federal statute stated an accused's failure to make a request to testify shall not create any presumption against him. The Kentucky statute which gave rise to the Supreme Court of Kentucky's decision in this case, however, (Kentucky Revised Statute 421.225) states that an accused's failure to testify ". . . shall not be commented upon or create any presumption against him." The federal statute in question in *Bruno, supra,* and the Kentucky statute are therefore not identical, since the Kentucky statute specifically prohibits comment on an accused's failure to testify.

After *Bruno,* this Court took up the question of whether the Fifth Amendment prohibits adverse comment on the defendant's failure to take the stand and testify. The Court in *Griffin* v. *California,* 380 U. S. 609 (1965), held that a provision of the California Constitution which permitted both the prosecuting attorney and the court to comment on an accused's failure to explain or deny by his testimony any evidence or facts in the case against him was violative of the

Federal Constitution. In the present case, while petitioner makes some passing comment in his brief that the prosecutor made indirect comments about petitioner's failure to testify, there was no direct comment made on the failure to testify and the *Griffin* issue is not a central issue in this case. As indicated by *Griffin,* an unconstitutional penalty arises from the trial court or the prosecutor focusing the jury's attention on the defendant's failure to testify.[5] No such focusing can occur by compliance with the Kentucky statute and judicial requirements. In a footnote the court in *Griffin, supra,* specifically stated:

> "We reserve decision on whether an accused can require as in *Bruno* v. *United States* . . . that the jury be instructed that his silence must be disregarded." *Griffin, supra,* at 615 n6.

That issue is now before the court. To be consistent with the previous decisions of this court the method of jury instruction herein should be left to the state.

Griffin was followed by *Lakeside* v. *Oregon,* 435 U. S. 333 (1978). In *Lakeside* the court held that when a trial judge gave the "no inference" instruction over the objection of a defendant, there was no error. The court noted that there had been debate over the years as to whether it is better to give a cautionary instruction of this type or whether it is better to say nothing about a defendant's silence. The court touched on the gravamen of this case by stating:

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[5] "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. . . ." *Griffin* v. *California,* 380 U. S. 609, at 614.

> "It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. *And each state is, of course, free to forbid its trial judges from doing so as a matter of state law.* . . ." (Emphasis added).
> *Lakeside* v. *Oregon,* 435 U. S. at 340.

The issue before the court in this case is whether the giving of the "no inference" instruction is a constitutional right within the discretion of the defendant. *Lakeside,* in holding that the defendant could not *prevent* such an instruction, answered that question in the negative. This Court should again answer that issue in the negative by holding that the defendant cannot *require* such instruction to be given in violation of a state statute. The Kentucky rule in *Green* v. *Commonwealth, supra,* need not be the same as the Federal rule in *Bruno* v. *United States supra*

> ". . . [R]eview by this court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberate judgment of a state in so basic an exercise of its jurisdiction." *Cupp* v. *Naughten,* 414 U. S. 141, 149 (1973), quoting from *McNabb* v. *United States,* 318 U. S. 332, 340 (1943).

B. The Highest Courts in Kentucky Have Consistently Held That the "No Inference" Instruction Is Not in the Best Interest of the Accused.

There have been some twelve cases decided by the highest appellate court in Kentucky on the issue of

whether a "no inference" instruction should be given.[6] In each of these cases the Kentucky courts evidenced their desire to protect the defendant's Fifth Amendment rights.

The earliest reported Kentucky case on this issue is *Tines* v. *Commonwealth*, 25 Ky. 1233, 77 S. W. 363 (1903). In the *Tines* case, the court condemned an instruction which would have stated that the jury shall not draw any presumption from the defendant's failure to testify. The court noted that such an instruction would direct the jury's mind to the fact that the defendant had not testified in his own behalf and the defendant is entitled to absolute silence on his failure to testify.

The rationale of *Tines* v. *Commonwealth, supra,* continued almost unchanged through six more cases.[7] In *Spencer* v. *Commonwealth,* Ky., 467 S. W. 2d 128 (1971), the court held that since the defendant in that

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[6]Prior to January 1, 1976, the highest appellate court in Kentucky was known as the Court of Appeals. After that date the highest appellate court became the Supreme Court of Kentucky. Judges of the former Court of Appeals automatically became the Justices of the Supreme Court of Kentucky, pursuant to Judicial Amendment of the Kentucky Constitution.

[7]*Armstrong* v. *Commonwealth,* 190 Ky. 217, 227 S. W. 162 (1921); *Hanks* v. *Commonwealth,* 248 Ky. 203, 58 S. W. 2d 394 (1933); *Roberson* v. *Commonwealth,* 274 Ky. 49, 118 S. W. 2d 157 (1938); *Kelley* v. *Commonwealth,* 300 Ky. 136, 187 S. W. 2d 796 (1945); *Hopper* v. *Commonwealth,* Ky., 371 S. W. 2d 646 (1963); *Farmer* v. *Commonwealth,* Ky., 461 S. W. 2d 551 (1970). In *Kelly* v. *Commonwealth, supra,* the court through dicta indicated the instruction should have been given under the factual situation of that case.

case did not request the instruction there was no error in the failure to give it. It reaffirmed the belief that the instruction would do more harm than good, but indicated through dicta that the defendant was entitled to such instruction when it was requested. The same judge who wrote the opinion in *Spencer* v. *Commonwealth* likewise wrote the opinion in *Scott* v. *Commonwealth,* Ky., 495 S. W. 2d 800 (1972). In *Scott* the court made it clear that the language in *Spencer* v. *Commonwealth* was mere dictum and stated:

> "In fact, the author of *Spencer* is now the author of the opinion in the instant case, which all goes to prove that a careless foxhound may sometimes lead the whole pack astray. We now repudiate the dictum in *Spencer, supra.*"

The court held that the appellant in that case was not entitled to an admonition pertaining to his failure to testify in his own behalf. *Scott* v. *Commonwealth,* 495 S. W. 2d at 802.

Scott v. *Commonwealth* was followed by *Dixon* v. *Commonwealth,* Ky., 478 S. W. 2d 719 (1972), which merely reiterated the *Scott* principle. In 1972, the Kentucky Supreme Court handed down the decision in *Green* v. *Commonwealth,* Ky., 488 S. W. 2d 339 (1972), which was the foundation for the opinion of the Supreme Court of Kentucky in the case *sub judice.* In *Green,* the Supreme Court of Kentucky interpreted the Kentucky statute [Ky. Rev. Stat. 421.225 (1)] as prohibiting comment by the prosecutor, the

trial court, or anyone else. The court distinguished *Bruno* v. *United States,* 308 U. S. 287, 60 S. Ct. 198, 84 L. Ed. 257 (1939), by pointing out that the *Bruno* case interpreted a *federal* "no inference" instruction and noted that the federal state giving rise to the *Bruno* decision failed to contain the final language of the Kentucky statute, ". . . but his failure to do so shall not be commented upon or create any presumption against him." The court stated that to give the "no inference" instruction would do violence to the clear intent of the Kentucky legislature to fully protect the rights of an accused standing as a defendant on trial. Under Kentucky law a defendant is not entitled to a "no inference" instruction. *Id.,* 341, 342.[8]

C. The Instruction's Refusal Did Not Coerce Petitioner Into Testifying in Violation of His Fifth Amendment Rights and He Suffered No Ascertainable Harm as a Result of the Refusal.

At the close of the evidence the trial court refused what petitioner has described as a "prophylactic instruction" in which he requested that the jury be told that no inference of guilt could be assumed from his failure to testify. The court, however, made it clear in its instruction that the jury was to consider only the evidence submitted to it in its decision. The court

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[8]*See also: Coleman* v. *Commonwealth,* Ky., 501 S. W. 2d 583 (1973), which reiterated the holding in *Farmer* v. *Commonwealth, supra,* and *Green* v. *Commonwealth, supra,* as well as *Collins* v. *Commonwealth,* Ky., 396 S. W. 2d 318 (1965); and *Luttrell* v. *Commonwealth,* 554 S. W. 275 (1977) which prohibit comment by defense counsel on the failure to testify.

cautioned the jury that the law presumes the defendant to be innocent and that they were to find the defendant not guilty unless they were satisfied from the *evidence alone* and beyond a reasonable doubt that he was guilty. (A 8). Since they were told that they were to consider only the evidence in the case in determining whether petitioner was guilty, it is apparent that they would have violated this instruction had they considered the fact that petitioner failed to take the stand and testify when they made their determination of his guilt. In substance therefore petitioner received the instruction he was seeking. It cannot be assumed that the jury disregarded the court's instruction that they were to consider only the evidence that was presented to them in reaching their determination.[9]

Petitioner suggests that the failure to give the "no inference" instruction unconstitutionally harms and coerces a defendant into giving up his Fifth Amendment right not to testify. Such an unverified supposition is unfounded. Whether it is better to give the instruction or not is a matter for debate. The wisdom of any given jurisdiction's decision on whether to give the instruction is not at issue. The question is whether the instruction was constitutionally mandated. Constitutional requirements in criminal trials should not be based upon conjecture or questionable assumptions. Before the Kentucky conviction in this case can be

[9]The prosecutor in his closing argument to the jury emphasized to the jury that they were to consider only what they had heard as evidence in the case and noted that they were not to speculate what might have happened or could have happened. (A 64.)

overturned, it must be established not merely that the failure to give the instruction is "undesirable," "erroneous," or even "universally condemned," but that some right guaranteed by the Constitution has been violated. *Cupp* v. *Naughten,* 414 U. S. 141, 146 (1973). Nothing in the procedures under Kentucky law or the conduct of the court was coercive. If anything, the situation in which an accused must defend himself in court is coercive.[10]

Every aspect of a trial may be deemed by a defendant to be coercive.[11] But it does not therefore follow that all aspects of the trial require a constitutionally mandated instruction. Furthermore, since petitioner failed to take the stand and testify, his discussion of coercion is irrelevant to this case.

From the remarks contained in the aforementioned Kentucky cases, as well as the statements appearing in *Lakeside* v. *Oregon, Supra,* and other, similar cases, it is clear that the allegations of harm and prejudice which might occur from refusing the "no inference" instruction are speculative. It is therefore logical to assume that the best course of action is for there to be no comment whatsover concerning the failure to tes-

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[10]As noted by this Court in *Jenkins* v. *Anderson,* ____ U. S. ____, 100 S. Ct. 2124, 2128, 65 L. Ed. 2d 86 (1980):

"... (T)he Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'"

[11]As noted in the dissent in *Griffin* v. *California,* 380 U. S. 609 at 623, "... No constitution can prevent the aberration of the human mind."

tify.[12] This is the course which the Commonwealth of Kentucky has chosen to take. While some may disagree with this course of action, there is nothing contained in the Fifth, Sixth, or Fourteenth Amendments to the United States Constitution which denies the States the right to choose what they consider to be the best and safest means of protecting an individual against self-incrimination. It is beyond question that the intent of the jurists in Kentucky is to jealously safeguard the defendant's rights against self-incrimination. Therefore while there may be those who disagree with the method chosen to safeguard these rights, there should be no question but what the means that are chosen are reserved to the state.[13]

Petitioner suggests that *Taylor* v. *Kentucky,* 436 U. S. 478 (1978) stands for the proposition that the Fifth and Fourteenth Amendments can be used as a justification for requiring a "no inference" instruction. Petitioner's reliance on *Taylor* v. *Kentucky,* which required a presumption of innocence instruction, is inappropriate, however, since the court was clear that the results that were reached therein primarily

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[12]The Court's silence on a defendant's choice to remain mute does not add to the defendant's risk that his choice might prove to be an error in trial tactics. The Court's silence on the defendant's exercise of his Fifth Amendment privilege did not create any greater pressure upon the defendant to testify than did the comment in *Lakeside* which highlighted defendant's silence.

[13]Should the court hold in favor of petitioner and allow retroactive application of the rule, the floodgates in Kentucky will be open for cases in which other defendants will ask for a retrial because of the same issue.

resulted from the facts in that particular case. As noted by the Court:

> "We hold that *on the facts of this case* the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. . . ." [Emphasis added]. *Id.,* at 490.

If there was any question about the holding of *Taylor* v. *Kentucky,* it was laid to rest by the later case of *Kentucky* v. *Whorton,* 441 U. S. 786 (1979). In *Whorton,* this court discussed the *Taylor* holding and stated:

> ". . . [T]he court did not there fashion a new rule of constitutional law requiring that such an instruction be given in every criminal case. Rather, the court's opinion focused on the failure to give the instruction as it related to the overall fairness of the trial considered in its entirety."

After stating that the evidence was weak against the defendant in the *Taylor* case, the court went on to state:

> ". . . [T]he failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under *Taylor,* such a failure must be evaluated in light of *the totality of the circumstances*—including all the instruction to the jury, the arguments of counsel, *whether the weight of the evidence was overwhelming,* and the other relevant factors — to determine

whether the defendant received a constitutionally fair trial." (Emphasis added). *Id.*, at 788, 789.

D. The Evidence of Guilt Was Overwhelming.

The Commonwealth submits the reason why petitioner failed to take the stand in his own defense was because the evidence of his guilt was overwhelming and could not be explained. When Officer Ellison observed the burglars at the hole in the wall of the hardware store, she noticed that one had on a dark colored shirt and rust or orange colored pants, and was carrying some items in his hand. (A 23). When the burglars saw the officer, they began running. After a chase petitioner was apprehended and the clothes he had on matched those worn by the burglar. (A 23). The burglary occurred at approximately 1:50 a.m. on a cold evening, and when petitioner was apprehended he had on no coat. There were two coats lying at the scene of the crime. (A 18, 19). (A 37, 38). During the chase petitioner dropped a gym bag and a radio (scanner) that was set on the local police band. (TE 40). At the police station petitioner admitted that the coats were his and indicated that he intended to take the "rap" alone. (A 49).

Petitioner's statement, coupled with the circumstances and other testimony in this case, points conclusively to his guilt. With proof of this magnitude, the jury could have come to no other conclusion but that petitioner was guilty. While respondent contends that the Fifth, Sixth, and Fourteenth Amendments do not require a court to give the "no inference" instruc-

tion, respondent also contends that if this court should declare that there is a constitutional right upon election of a defendant to require the giving of the instruction, any error that might have been committed in this case was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U. S. 18, 172 L. Ed. 2d 705, 87 S. Ct. 824 (1967); *Harrington* v. *California,* 395 U. S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969). Similarly, the "totality of the circumstances" in this case is unlike *Taylor* v. *Kentucky, supra,* where the requested instruction was constitutionally necessary to purge the negative circumstances and thereby insure a fair trial. Cf. *Kentucky* v. *Whorton, supra,* 441 U. S. at 789.

E. Petitioner's Persistent Felony Offender Argument.

Petitioner suggests that his failure to testify in this case had nothing to do with his guilt or innocence, but instead related in some way to the fact that his testimony would be impeached by the prior felonies and he would thereby be admitting guilt in the Persistent Felony Offender portion of the trial.[14] While the two felonies that were chosen for impeachment purposes were the same ones that would be used in the Persistent Felony Offender portion of the trial, there was no suggestion by counsel for petitioner at the time of the hearing on the felonies for impeachment pur-

[14]Appellant's brief, pp. 16, 35-37.

poses,[15] that petitioner objected to the use of those two felonies for impeachment purposes. (A 56-59).

Petitioner literally confessed guilt during the Persistent Felony Offender phase of the trial. As noted, counsel for petitioner did not cross-examine any of the witnesses during their rather routine testimony showing petitioner had violated the Kentucky Persistent Felony Offender statute. He did not take the stand in his own defense during this phase of the trial and he offered no witnesses or evidence. (TE 136-137). During closing argument to the jury on this phase of the trial, counsel for petitioner admitted that petitioner could not contest the fact that he had been convicted of these two previous felonies. (TE 139).

Petitioner's suggestion that he did not take the stand and testify because he would thereby have to admit guilt during the Persistent Felony Offender phase of the trial is a "red herring." Petitioner could not and did not contest the two previous convictions. It is apparent that petitioner did not testify simply because he could not explain to the jury his incriminating statements and what he was doing near the burglarized hardware store in the middle of a cold night without a coat on and carrying a police band radio.

F. Petitioner Received a Fair Trial.

Petitioner contends that even if the Fifth Amendment does not require the instruction, under the facts

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[15]Pursuant to the guidelines established by the Kentucky Supreme Court in *Cotton* v. *Commonwealth*, Ky., 454 S. W. 2d 698 (1970).

of this case the instruction was mandated by the Fourteenth Amendment. Since the trial proceedings were constitutionally fair petitioner's contentions are without merit.

During voir dire the Trial Judge explained to the prospective jurors that petitioner was presumed by the law to be innocent and that the Commonwealth must prove petitioner's guilt beyond a reasonable doubt in order for the jury to find him guilty. (A 14, 15). This was reemphasized by petitioner's counsel during his opening statement. (A 16, 17). The jury was instructed on the presumption of innocence. The Court also instructed the jury that they would find the defendant not guilty unless they were satisfied from the evidence *alone* and beyond a reasonable doubt that he was guilty. (A 8). In his closing arguments the prosecuting attorney emphasized this point by telling the jury that they were to consider only what they had heard as evidence and that they were not to engage in speculation. (A 64).

Counsel for petitioner indicated in his opening remarks that petitioner would have a chance to speak for himself. (A 16, 17). In his closing remarks counsel for petitioner explained to the jury that his client did not have to take the stand in his own behalf. (A 60, 63).[16]

Petitioner complains that the Commonwealth Attorney made numerous references to the evidence being

[16]Counsel for petitioner made this statement to the jury without objection from the prosecuting attorney—see *Collins* v. *Commonwealth* and *Luttrell* v. *Commonwealth, supra.*

"uncontradicted" during closing argument. Although it was noted that items of evidence were uncontradicted, the statements of the Commonwealth Attorney during closing argument did not receive an objection from petitioner. (A 68). Since the prosecutor's remarks were not manifestly intended to point to petitioner's failure to testify and since the jury would not naturally take them as such, the prosecutor's argument was not constitutionally impermissive. *United States* v. *Estrada de Castillo,* 549 F. 2d 583 (9th Cir. 1976).

It is therefore apparent that petitioner's suggestion that his due process rights under the Fourteenth Amendment were violated by the method and manner in which this trial was conducted is completely unwarranted. Both the court and the prosecuting attorney took great pains to insure that petitioner's Fourteenth as well as his Fifth Amendments rights were protected.

CONCLUSION

The Fifth Amendment to the United States Constitution does not require the "no inference" instruction. Since petitioner received a fair trial the Fourteenth Amendment to the United States Constitution was not violated. For the reasons stated above the decision of the Supreme Court of Kentucky should be affirmed.

Respectfully submitted,

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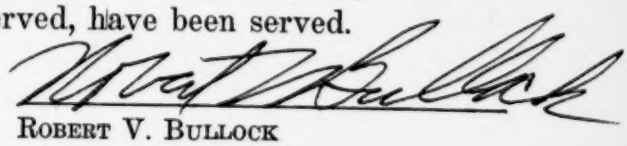
CERTIFICATE OF SERVICE

I, Robert V. Bullock, counsel for respondent, hereby certify that the foregoing Brief for Respondent was served on petitioner by personally mailing three copies each of the same to counsel for the petitioner, Honorable Kevin Michael McNally, Assistant Public Advocate, at his office, State Office Building Annex, Frankfort, Kentucky 40601, this 16th day of December, 1980. I further certify that all parties required to be served, have been served.



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OCTOBER TERM, 1980

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LONNIE JOE CARTER,

PETITIONER,

v.

COMMONWEALTH OF KENTUCKY,

RESPONDENT,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

REPLY BRIEF FOR PETITIONER

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ARGUMENTS

I.

THE RECORD AFFIRMATIVELY REFLECTS, AND RESPONDENT ADMITTED BELOW, THAT PETITIONER DECLINED TO TESTIFY DUE TO FEAR OF IMPEACHMENT BY THE USE OF PRIOR FELONY CONVICTIONS.

Kentucky attacks Carter's assertion that he declined to testify for a reason unrelated to guilt or innocence [Brief for Respondent, hereinafter BR, 25-26]. "It is apparent that petitioner did not testify simply because he could not explain to the jury his incriminating statements and...[other circumstances]"[BR, 26]. Perhaps this belated argument can be best met by quoting from Respondent's Brief in the Supreme Court of Kentucky [hereinafter AGB], where the Attorney General stated, in pertinent part:

> ...an extensive hearing was held in-chambers to discuss whether or not the appellant would testify...the Commonwealth indicated its intention to impeach the appellant through the use of his three most recent felony convictions. Faced with this dilemma, the appellant, with the advice and consent of counsel, chose not to take the stand. [AGB, 6; emphasis added.]

In the context of a related argument below,[1] respondent stated:

> It is true that the Commonwealth indicated to the appellant in closed chambers its intention to impeach him with these prior felony convictions if he took the stand. The knowledge of this fact most definitely influenced the appellant in his decision not to take the stand.... [AGB, 9; emphasis added.]

Respondent's main thrust is that since trial counsel did not specifically object to impeachment by the use of the prior felonies in issue during the recidivist trial, this indicates that Carter was not actually concerned with this possibility (and actually declined to testify solely because he had nothing to say). This argument overlooks several crucial points. First, whether petitioner was specifically concerned with use of the enhancement felonies is not of central importance to this case. It is not denied that both trial counsel and Carter were very worried regarding the effect on the jury of impeachment by prior felony convictions in general regardless of which the prosecution decided to use.[2]

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[1] Carter argued that it was a denial of due process of law under the Fourteenth Amendment for the trial court to refuse to exercise its statutory discretion to impanel a second jury for the recidivist hearing since impeachment by the prior felonies in issue during the persistent felon phase was threatened during the trial of the triggering offense . KRS 532.080(1). [Carter's Brief in Kentucky Supreme Court, hereinafter CB, Issue V, 17-18].

[2] "Hon. W.E. ROGERS, III: Judge, I think possibly the only reservation Mr. Carter might have about testifying would be his impeachment by the use of these previous offenses... [It is] a heavy thing...I think juries take it very seriously..." [A, 54,55].

Therefore, petitioner's essential point remains: Carter declined to testify for a reason unrelated to guilt or innocence.

Second, while trial counsel did not specifically address himself to the use of the enhancement felonies for impeachment,[3] this was unnecessary since the trial judge considered and satisfied himself of the propriety of the use of these convictions.[4] More importantly, it was Mr. Carter himself who expressed concern regarding impeachment by use of the enhancement felonies by inquiring of the trial judge whether he was going to permit this.[5]

Finally, respondent places great reliance upon trial counsel's admission during closing argument in the recidivist trial that the two previous felonies couldn't be contested. Counsel argued for "mercy" [TE, 139]. Respondent claims this reveals that Carter's fear of impeachment was a "red herring" and not actually the motivation for his failure to testify [BR, 26]. Once again, this argument overlooks the crucial fact that Carter properly insisted that Kentucky shoulder the burden of proving the existence of his prior felony convictions. Respondent fails to appreciate the importance of petitioner's reliance upon his constitutional right not to incriminate himself. Had Carter been forced to admit his prior felony convictions during cross-examination in the trial of the burglary charge, he would have waived his valuable Fifth Amendment right as to the recidivist trial.[6] The fact that trial counsel later determined that the prosecution had proven the felonies in issue and felt obligated to argue for "mercy" is of no relevance to the

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[3]Under Kentucky law, an objection was pointless since impeachment during the guilt phase is permissible even by the prior felony convictions in issue during the recidivist portion of the trial. Brown v. Commonwealth, 551 S.W.2d 557, 559-560 (Ky. 1977). See discussion in Brief for Petitioner [hereinafter BP, 36 n. 28]. Furthermore, since the Kentucky Supreme Court reached and disposed of Carter's complaint in this regard, reaffirming Brown, it is clear that petitioner did not "waive" this issue in the trial court as argued by respondent [A, 78-79].

[4]"THE COURT: Well, there's no rule that I know of that prohibits using those" [A, 57].

[5]"LONNIE JOE CARTER: Are you saying the most recent convictions? THE COURT: Well, they are the ones he plans to use. Now, do you understand what you are charged with? LONNIE JOE CARTER: Yes, sir." [A, 58.]

[6]Conviction as a persistent felon or habitual criminal in Kentucky, as noted in petitioner's initial brief, is not "automatic" [BP, 37 n. 30]. A relatively large number of recidivist convictions have been reversed for failure to prove elements of the offense. In addition to those cited previously, see Newton v. Commonwealth, 558 S.W.2d 167, 168 (Ky. 1977); Martin v. Commonwealth, 571 S.W.2d 613, 615 (Ky. 1978). The jury is always free to disregard the Commonwealth's proof. See Lynch v. Commonwealth, 472 S.W.2d 263, 266 (Ky. 1977). "[N]o matter how well [the prior felonies] ...have been prove[n] it is still the jury's prerogative to disbelieve any or all of them." Satterly v. Commonwealth, 437 S.W.2d 929, 930 (Ky. 1969).

issue before this Court. The Commonwealth was properly required to sustain its burden of proof[7] and trial counsel's decision to concede the existence of the prior felonies at that point does not demonstrate that Carter's initial refusal to waive his Fifth Amendment right as to the recidivist charge was either bogus or foolish. Cf. Mullaney v. Wilbur, 421 U.S. 684 (1975).

II.

THE CONSTITUTIONAL VIOLATION IN ISSUE IS NOT SUSCEPTIBLE TO A HARMLESS ERROR ANAYLSIS AND WAS NOT HARMLESS BEYOND A REASONABLE DOUBT. ALTERNATIVELY, RESPONDENT'S CLAIM WAS NOT PRESENTED BELOW AND SHOULD NOT BE CONSIDERED INITIALLY BY THIS COURT.

A. Refusal of a "no inference" instruction can never be harmless error under the Chapman test.

Accepting for sake of argument the constitutional violation complained of, respondent contends that the error was "harmless beyond a reasonable doubt" because the evidence of Carter's guilt was "overwhelming and could not be explained" [BR, 24-25]. Because of the fundamental nature of the right at stake, Carter submits that refusal of the protective instruction requested can never constitute harmless error.

The federal harmless error rule, presently 28 U.S.C. § 2111 (1959),[8] was, in addition to the "no inference" instruction, also in issue in Bruno v. United States, 308 U.S. 287 (1939). This Court noted that the harmless error rule was designed to eliminate reversal based upon "mere etiquette of trials and the formalities and minutiae of procedure..." 308 U.S. at 294. "Of a very different order of importance is the right of an accused to insist on...[the "no inference" instruction]." Id. Bruno stands for the proposition that, at least as a matter of federal criminal procedure, refusal to give the protective instruction cannot be harmless error.

Of course, a different, and more stringent, harmless error test applies to violations of the United States Constitution. Chapman v. California, 386 U.S. 18, 22 (1967), recognized that "there may be some constitutional errors which in

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[7] Actually, although trial counsel did not raise the issue in the trial court, the prosecution failed to prove the date the prior felonies were committed. This fact was necessary to sustain proof of an element of the offense that Carter "was over the age of eighteen (18) at the time the offense [prior felony] was committed." KRS 532.080(3)(b)[CB, 24-25; A, 84].

[8] The statute relied upon by the prosecution in Bruno, 28 U.S.C. § 391 (1928), required disregarding "technical errors, defects...which do not affect the substantial rights of the parties."

the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Conversely, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error..." 386 U.S. at 23 (footnote omitted). Chapman held that prosecutorial comment on the defendant's failure to testify was a constitutional error which could be harmless. However, a strict test was constructed to prevent "unfair and mischievous" results from harmless error analysis. 386 U.S. at 22. The burden was placed upon the prosecution to demonstrate that the error "was harmless beyond a reasonable doubt." 386 U.S. at 24. Since a more stringent harmless error analysis applies to violations of constitutional magnitude, and since refusal of the "no inference" instruction is never harmless under federal procedure, it follows, a fortiori, that the same error cannot be held "harmless" under a constitutional analysis.

In Harrington v. California, 395 U.S. 250, 254 (1969), this Court had the occasion to apply the Chapman standard. It was stated:

> We admonished in Chapman...against giving too much emphasis to "overwhelming evidence" of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless (emphasis added).

Since in Bruno, 308 U.S. at 293, a unanimous Court held that refusal of a "no inference" instruction does "affect the substantial rights" of the defendant, it follow, again a fortiori, that the constitutional violation in issue is not susceptible to a Chapman harmless error analysis.

Refusal to instruct upon a fundamental constitutional principle is exactly the type of situation which should be beyond the reach of the harmless error rule. It is petitioner's contention that refusal of the prophylactic instruction tended to strip away the presumption of innocence, shift the burden of proof to the defendant and thereby dilute the reasonable doubt standard. Carter fears that the jury focused solely upon his failure to explain the admittedly incriminating circumstances instead of examining the Commonwealth's evidence to determine whether the prosecution had met its burden as to each element of the offense [BP, 37-43]. "Here, the truth-finding function of the jury was invaded and the State's burden of proving guilt beyond a reasonable doubt was diminished... When the reasonable doubt standard has been thus compromised...such an error so conflicts with an accused's right to a fair trial that the infraction 'can never be treated as harmless error.'" Cupp v. Naughten, 414 U.S. 141, 145 (1973)(dissenting opinion), quoting Chapman, 386 U.S. at 23.

As a practical matter, the claimed constitutional violation would not easily submit itself to harmless error analysis.[9] In order to ascertain the degree of prejudice, the appellate court must speculate on the degree of influence the defendant's failure to testify had in the context of the jury deliberations, a difficult task at best. As with the right to counsel, the right to decline to testify "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice..." Chapman, 386 U.S. at 43 (Stewart, J., concurring), quoting Glasser v. United States, 315 U.S. 60, 76 (1941). A prophylactic approach is called for. See, e.g., Davis v. Alaska, 415 U.S. 308, 318 (1974); Tumey v. Ohio, 273 U.S. 510, 535 (1927). State courts have so held. See People v. Britt, 43 N.Y.2d 111, 371 N.E.2d 504, 505 (1977); Perry v. State, 368 So.2d 310,312 (Ala. 1979).

This Court has apparently held that substantial instructional errors, even those that are not of constitutional magnitude, are not to be excused by invocation of the harmless error doctrine. In Bollenbach v. United States, 326 U.S. 607 (1945), this Court dealt with an erroneous instruction regarding a presumption and rejected the Government's contention that the harmless error rule precluded reversal. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." 326 U.S. at 613. Relying on Bruno, this Court stated:

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be. 326 U.S. at 615.

In United Brotherhood v. United States, 330 U.S. 395, 408 (1946), it was held that the defendant had been entitled to an instruction correctly stating its liability for certain conduct "[n]o matter how strong the evidence may be...." Again relying on Bruno, this Court refused to apply the harmless error rule.

> The problem is not materially different from one where the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give the reasonable doubt instruction. It could not be said that the failure was harmless error. 330 U.S. at 410 (footnote omitted).

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[9] An additional practical problem is that in many, if not most cases, the prosecution's proof will be largely or wholly uncontradicted, since in order to raise the issue realistically the defendant must decline to testify. [See reply argument IV.] This raises the possibility that application of the harmless error rule would eviscerate the claimed constitutional right.

See also Weiler v. United States, 323 U.S. 606, 611 (1944). Carter submits that the constitutional violation in issue can never be harmless error.

B. Refusal of the "no inference" instruction at petitioner's trial was not harmless beyond a reasonable doubt.

Carter disagrees with the respondent's contention that the evidence of his guilt was "overwhelming" and that any error was "harmless beyond a reasonable doubt" [BR, 24-25]. The Commonwealth's conclusory statement of facts [BR 1-9, 24-25] omits reference to points which may shed some doubt on the Commonwealth's case. For example, Officer Davis lost sight of the person he was chasing twice before apprehending petitioner [A, 37-38]. Officer Ellison did not state that the perpetrator "wore rather distinctive looking clothing" [BR, 4]. Ellison did testify that Carter "appeared to be wearing the same clothing as the man she saw running" [A, 22]. Petitioner will rest upon the facts as stated previously [BP, 1-12].

Without a doubt, the prosecution presented sufficient evidence to carry its burden of proof on the burglary charge. However, in the absence of positive eyewitness testimony by Officer Ellison or other iron-clad proof that petitioner was the man seen in the alley, the evidence cannot be considered overwhelming as defined in Harrington. Indeed, the evidence in the present case pales in contrast to that presented in Harrington. The present case is more akin to Chapman where this Court had "no doubt that the error...was not harmless..." 386 U.S. at 24.

Respondent places great emphasis on petitioner's "statement" as pointing "conclusively to his guilt" [BR, 24]. First of all, although certainly an admission, Carter's statement to the police was not a confession. More importantly, Carter argued to the Supreme Court of Kentucky that the statement was solely the product of the police refusal to "scrupulously honor" his decision to remain silent during interrogation. See Michigan v. Mosley, 423 U.S. 96, 103-104 (1975). Despite an objection by trial counsel at the first reference to petitioner's statement during trial [TE, 20], the Kentucky Supreme Court held this allegation of federal constitutional error inadequately presented to the trial court [A, 75]. Carter could, of course, still pursue in federal court his claim of constitutional error by demonstrating "cause" and "prejudice" for trial counsel's alleged procedural default. See Wainwright v. Sykes, 433 U.S. 72 (1977).

The Commonwealth should not be permitted to benefit from the admission at trial of the illegally obtained statement, particularly since the police officers' testimony about the interrogation procedure and petitioner's refusal to cooperate are substantial factors contributing to the necessity for the prophylactic instruction on petitioner's silence at trial. Carter submits his admission should be

disregarded in determining whether the refusal to give a "no inference" instruction was harmless. In essence, the statement is the equivalent of the constitutionally tainted evidence which cannot be considered under the Chapman-Harrington test.

Finally, respondent makes passing mention of Kentucky v. Whorton, 441 U.S. 786 (1979). It is obvious that the present case compares favorably with Whorton, where there were "numerous eyewitnesses" as well as much physical evidence conclusively establishing guilt. 441 U.S. at 787. In fact, evidence introduced below may not be as persuasive as that in Taylor v. Kentucky, 436 U.S. 478 (1978), where an eyewitness, who had known the defendant for several years, testified unequivocally that the defendant had robbed him. 436 U.S. at 480. Considering the "totality of the circumstances" of Carter's trial, neither a Chapman-Harrington analysis nor a Whorton analysis should preclude reversal.

C. Respondent's harmless error claim was not presented below and should not be considered by this Court as an initial matter.

An examination of the Commonwealth's brief in the Kentucky Supreme Court demonstrates that no argument was presented that the failure to give the "no inference" instruction was harmless error—under either state or federal standards [AGB, 6-9]. In Sandstrom v. Montana, 442 U.S. 510 (1979), this Court held that a state court instruction requiring a presumption regarding intent was unconstitutional as violative of the Fourteenth Amendment. Montana argued that any error was harmless under Chapman. Since the harmless error claim had never been considered by the Supreme Court of Montana, this Court declined "to reach...[the issue] as an initial matter..." 442 U.S. at 527. As a general rule, this Court will not consider contentions not presented below. See, e.g., Dorszynski v. United States, 418 U.S. 424, 431 n.7 (1974); Jenkins v. Anderson, ___ U.S. ___, 100 S.Ct. 2124, 2127 n.1 (1980); Anderson v. Charles, ___ U.S. ___, 100 S.Ct. 2180, 2181 n.1 (1980).

There is good reason for this rule. For example, Kentucky's unique procedure of jury sentencing must be accounted for in any harmless error analysis. In Abernathy v. Commonwealth, 439 S.W.2d 949, 953 (Ky. 1969), the Kentucky Supreme Court described the ingredients in a harmless error analysis under Kentucky procedure:

> Necessarily, one important circumstance in determining whether a particular error was prejudicial is the weight of the evidence. Another is the amount of punishment fixed by the verdict, especially with regard to the allowable minimum and maximum (emphasis added).

See also Niemeyer v. Commonwealth, 533 S.W.2d 218, 222 (Ky. 1976). In the present case, respondent should be required to first present its claim of harmless error to the Kentucky Supreme Court.

III.

KENTUCKY HAS FAILED TO ARTICULATE ANY CONSISTENT OR SUBSTANTIAL STATE INTEREST IN PRECLUDING A "NO INFERENCE" INSTRUCTION.

Respondent repeatedly insists that the Kentucky courts have consistently held that a "no inference" instruction is contrary to the accused's best interests [BR 9, 16-17]. That simply is not so. As recently as 1971 the Kentucky Supreme Court stated that a non-testifying defendant was entitled to a "no inference" instruction to implement KRS 421.225. Spencer v. Commonwealth, 467 S.W.2d 128, 131 (Ky. 1971). The court relied on its prior decisions from 1945 and 1963 espousing the same position. The Kentucky courts' present position absolutely prohibiting the prophylactic instruction represents a recent reversal of policy. Clearly no consistent state policy is involved.

Significantly, the only rationale advanced by the Kentucky courts for prohibiting an instruction on the defendant's failure to testify is protection of the defendant. Respondent indicates that what is at issue here is Kentucky's "notion of what will best further its own security in the administration of criminal justice...," citing Cupp v. Naughten, 414 U.S. 141, 149 (1973)[BR, 16]. Since the only articulated rationale for Ketucky's position concerns petitioner's rights, this case does not present a "basic...exercise of...jurisdiction" which must be given due respect. Id.

Frankly, this Court should strictly scrutinize the Commonwealth's position since the only justification offered for forbidding the prophylactic instruction is protection of the defendant's rights. Both this Court and the Kentucky Supreme Court have recognized the protective nature of the "no inference" instruction. Lakeside v. Oregon, 435 U.S. 333, 340 (1978); Spencer v. Commonwealth, 467 S.W.2d at 131. Respondent's simultaneous reliance upon Lakeside and Kentucky's policy that the tendered instruction is harmful to the

criminal defendant turns reality on its head.[10]

States are not "free to formulate their own rules to protect their citizens in criminal court proceedings" [BR, 10-11] if those rules in fact harm rather than protect the citizens. The Fifth Amendment privilege against self-incrimination is a specific constitutional right jealously protected by this Court. Respondent's contention that "there should be no question but what the means that are chosen [to protect that right] are reserved to the state" [BR, 22] disregards the fundamental nature of the right at stake. This Court has not hesitated to require the states to adhere to federal constitutional standards in protecting the Fifth Amendment privilege. Griffin v. California, 380 U.S. 609 (1965). It should not hesitate to do so in this case.

IV.

PETITIONER'S DECISION TO RELY UPON HIS RIGHT NOT TO TESTIFY DOES NOT MAKE "IRRELEVANT" HIS ALLEGATION THAT THE FIFTH AMENDMENT WAS VIOLATED.

Respondent urges that "since petitioner failed to take the stand and testify, his discussion of coercion is irrelevant to this case" [BR, 21]. Apparently,[11] the Commonwealth is relying on the reasoning of the dissenting justices in Brooks v. Tennessee, 406 U.S. 605, 613 (1972) and New Jersey v. Portash, 440 U.S. 450, 463 (1979). That reliance is obviously misplaced.

Both Brooks and Portash involved penalties that would actually be exacted only if the defendant testified.[12] Neither defendant testified. The majority in each case accepted that a penalty on the defendant's right not to

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[10] Likewise, petitioner strongly disputes respondent's contention that "[b]oth the court and the prosecuting attorney took great pains to insure that petitioner's Fourteenth as well as his Fifth Amendment rights were protected" [BR, 28]. Respondent overlooks the numerous instances of error, often federal constitutional in nature, which occurred at Carter's trial [See discussion, BP, 12 n. 6]. The refusal of the police to honor Carter's decision to remain silent at the time of his arrest and extensive reference during trial to his initial refusal to say anything are obvious from the record. See Miranda v. Arizona, 384 U.S. 436, 469, 473-474 (1966). The prosecution misled petitioner until the day of trial by indicating in discovery proceedings that Mr. Carter had made no statements [CB, 1, 18-19]. Even a burden of proof instruction was refused [CB, 21-22]. Carter's numerous allegations of error on appeal were rejected, for the most part, not because they were meritless, but because they had not been presented below. Petitioner's trial was hardly one where "great pains" were taken to protect his rights.

[11] The Commonwealth cited no authority for its position.

[12] In Brooks the defendant was required to testify first or not at all. Thus if he chose to testify he was penalized by being forced to do so at a time when he could not know whether his testimony would be helpful or necessary. In Portash the defendant was subject to impeachment by his immunized testimony if he testified. By choosing to testify he risked forfeiting the right not to incriminate himself with his prior statements.

testify was imposed anyway because a constitutionally invalid rule of law impermissibly determined the defendant's decision not to testify. The dissenters in both cases contended that because the defendant did not testify no penalty was exacted. Their apparent concern was the lack of any concrete controversy because the court's advance ruling on what would happen if the defendant did testify was merely "hypothetical" since he did not testify. Portash, 440 U.S. at 466.

Contrastingly, both Carter's case and Griffin v. California, supra, involve penalties that are exacted only if the defendant does not testify. In Griffin the penalty for failing to testify was adverse comment by the prosecutor. The penalty in petitioner's case is unchecked speculation by the jurors about the reasons why petitioner declined to take the stand. Petitioner did not testify, and he requested a "no inference" instruction which was refused. No "hypothetical ruling" is involved. There is a concrete controversy. Petitioner's decision to rely upon his Fifth Amendment right not to testify does not make his penalty claim "irrelevant" [BR, 21]. In fact, the exercise of the privilege makes the claim real. The only similarity between Brooks, Portash and the present case is the fact that the defendants did not testify. In other respects the factual situations are very different. Respondent's contention should be rejected by this Court.

V.

NOTHING IN THE TRIAL COURT'S INSTRUCTIONS CONVEYED THE SUBSTANCE OF THE REJECTED PROPHYLACTIC CHARGE.

Respondent argues that the trial court's presumption of innocence instruction which required the jurors to find petitioner not guilty unless satisfied "from the evidence alone, and beyond a reasonable doubt, that he is guilty" [A, 8] was so similar to the "no inference" instruction requested by petitioner that "[i]n substance therefore petitioner received the instruction he was seeking" [BR, 20]. Respondent's argument is imaginative but neither logical nor persuasive.

Carter requested the trial court to inform the jurors that he is "not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way" [A, 5]. The Commonwealth reasons that the jurors knew that they were forbidden to consider the fact that petitioner did not testify because they were instructed to determine guilt "from the evidence alone" and failure to testify is not evidence [BR, 19-20].

Respondent's argument is highly technical, legalistic and unpersuasive when the realities of a jury trial are considered. Jurors are not lawyers. They do not know the precise definition of "evidence." The notion that they will conclude

simply from being told to consider the evidence alone that they must not consider the defendant's failure to testify is simply not reasonable. That conclusion requires interpreting a general statement in a specific, legalistic way. The minds of jurors simply do not function in this manner. Furthermore, the Commonwealth's argument begs the question. Carter sought an instruction that would prevent his failure to testify from being used as evidence of guilt. Nothing in the presumption of innocence instruction defined "evidence" to exclude Carter's failure to testify. Therefore, it had no substitute curative effect.

An instruction which specificially directed the jurors' attention to the ramifications of petitioner's not testifying was essential. Nothing in the court's abbreviated charge to the jury conveyed the substance of the instruction proposed by petitioner [BP, 39-43]. See United States v. English, 409 F.2d 200 (3rd Cir. 1969), where the Third Circuit Court of Appeals emphasized that "although the district court's instructions fully and fairly advise the jury of the presumption of innocence" the absence of a "no inference" instruction "impermissibly left the jury free to speculate on the effect of the defendant's silence." Id. at 201. Likewise, in petitioner's case the jurors were permitted to speculate about petitioner's failure to testify because they were not forbidden to do so by the court's instructions.

Jurors do notice a defendant's failure to testify [BP, 27]. Particularly in a trial such as petitioner's where his silence was repeatedly emphasized to the jury, the absence of a "no inference" instruction penalizes the exercise of the Fifth Amendment privilege and deprives the accused of a fair trial.

CONCLUSION

For the reasons stated above and in petitioner's original brief, Lonnie Joe Carter respectfully requests this Court to reverse the decision of the Supreme Court of Kentucky affirming his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin Michael McNally, counsel for petitioner, hereby certify that the foregoing Reply Brief for Petitioner was served on respondent by personally mailing three copies each of the same to counsel for respondent, HONORABLE ROBERT V. BULLOCK, Assistant Attorney General, at his office, Capitol Building, Frankfort, Kentucky 40601, this 2nd day of January, 1981.

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